

## **NOTE**

This **Digest of Transportation Cases** is published by the **Washington Utilities and Transportation Commission**. It is offered as an aid to legal research. Each entry summarizes a principle which the Commission applied to an issue and cites to the decision(s) containing the discussion and application of the principle.

The Index subject headings are arranged in categories beginning with those principles with the broadest application and concluding with those that apply only to distinct modes of transportation or to specific circumstances.

This 1998 update of the 1995 edition completely replaces previous publications. It includes orders entered between July 1982 and December 1997.

Cross references in the body of the digest are not intended to be exhaustive. Rather, they are intended to guide the user to sections where additional headnotes concerning the subject appear. The user should refer to the Index for further cross references.

Comments, corrections, and requests for copies may be addressed to the Secretary of the Commission, 1300 S. Evergreen Park Drive S.W., P.O. Box 47250, Olympia, Washington 98504-7250.

**Instructions for updating 1997 Edition:** In 1997, we provided replacement pages for updating the 1995 edition. We are following the same procedure for 1998. The 1998 update is in the form of double-sided replacement pages which say ATransportation Digest (1998 Replacement)@ in the footer. Remove the correspondingly-numbered pages from the Transportation Digest (as updated in 1997) and replace them with 1998 replacement pages.

If you did not update your 1995 Edition, you should request the 1997 replacement pages, inset them first, then insert the 1998 replacement pages. Note that the entire case list from the 1995 Digest was replaced in 1997. For 1998, we are providing replacement pages to update the case list.

In future years, the Commission may not update the Transportation Digest annually, due to the small number of final transportation orders. Our current plan is to publish annual compilations of the statements of principle from the monthly Transportation Orders publication that have been published since the most recent Transportation Digest, and to update the Transportation Digest itself every third year.

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## WASHINGTON CONSTITUTION

**Appellate decision.** In an application proceeding, the Commission is not required to give an applicant actual notice that it will consider evidence of the applicant's prior violations of Commission laws and rules. Washington Constitution, Article I, Section 3; RCW 81.80.070 (entry common carriers: fitness). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

**Appellate decision.** Commission regulation does not violate the constitutional prohibition against monopolies. Washington Constitution, Article XII, Section 22. Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991) (**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

The granting of a limited number of certificates to perform solid waste collection service under chapter 81.77 RCW in the form of "regulated monopoly" does not violate or conflict with the anti-monopoly provisions of Article 12, ' 22 of the Washington State Constitution. Constitution; RCW 81.77.040. Order M. V. G. No. 1660, In re Superior Refuse Removal Corporation, App. No. GA-896 (September 1993).

## PROCEDURE -- ASHBACKER DOCTRINE

(Ashbacker Radio Corp. v. FCC, 326 US 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945))

The question of whether the Commission should conduct a comparative analysis of competing applications, arises only if the Commission may consider granting the same or overlapping authority to two or more qualified applicants. RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (Nov., 1990). Order M. V. G. No. 1452, In re American Environmental Management Corp., Hearing No. GA-874 (November 1990).

Comparative review is required when competing applications for authority may be mutually exclusive. The applications are mutually exclusive if the grant of one effectively precludes the grant of the other. Order S. B. C. No. 467, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308; Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

Two competing applications for authority to conduct passenger and freight launch service may both be granted if the Commission finds that the nature of the service, the level of need, and the applicants' ability to fully meet the shippers' needs, are consistent with a grant of authority to more than one carrier. RCW 81.84.020. Order S. B. C. No. 467, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308; Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).



## **Procedure -- Ashbacker Doctrine**

Competing applications for common carrier authority are not mutually exclusive; a grant of one during the pendency of the other does not preclude a grant of the second application upon a sufficient showing of need. Ashbacker doctrine. Order M. V. No. 140746, In re Yakima Valley Disposal, Inc., App. No. P-72643 (January 1990).

When the Commission compares two qualifying applications, their timing and the reasons for the timing may be appropriate elements in the evaluation. Ashbacker Doctrine. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

When each of two competing applications for authority presents substantial evidence of favorable community sentiment, the Commission may consider in its comparative evaluation the sentiment of persons who have been served by both carriers. Ashbacker Doctrine; RCW 81.77.040. Order M. V. G. No. 1402, R. S. T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Pursuant to Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), when two bona fide applications are mutually exclusive, the grant of one without a hearing of both deprives the loser of the opportunity that Congress chose to give. When the evidence will not support a finding that the territory sought can support only a single carrier, the issues of Ashbacker are not applicable. Order M. V. No. 136191, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (July 1987).

When authority to provide passenger ferry service is proposed to be granted on a conditional basis pending a comparative review by the Commission of two competing applications, and the parallel application is withdrawn, the grant may be affirmed without the condition. RCW 81.84.010; RCW 81.84.020. Order S. B. C. No. 432, In re Bill Walsh, App. No. B-274 (February 1987).

When two carriers are competing for the same routes and stipulate as to evidence of need, the Commission will not consider which carrier initially presented the stipulated evidence. RCW 81.68.040. Order M. V. C. No. 1482, In re Pacific Northwest Transportation Services, Inc., et al., App. Nos. D-2468 and D-2469 (February 1985).

When there are three competing applications for bus service, the Commission will weigh the various positive and negative components of each application and grant the application that offers the greatest advantage to the public. RCW 81.68.040. Order M. V. C. No. 1444, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

In reviewing competing applications for bus authority, the Commission will weigh the various positive and negative aspects of each application and grant the application that will offer the greatest advantages to the public. RCW 81.68.040; Former WAC 480-08-050(9). Order M. V. C. No. 1443, In re Pacific Northwest Transportation Services, Inc., App. No. D-2444 (May 1984).

## ESTOPPEL

The requirements of equitable estoppel are not met solely by facts that indicate that a person operated a carrier for many years without Commission authorization or interference. Estoppel;

Order M. V. No. 145830, WUTC v. Toledo Trucking, Inc., Hearing No. H-5005, and In re Toledo Trucking, Inc./Elmer Cook Trucking, Inc., App. No. P-75157 (December 1992).

Order M. V. No. 128063, In re Paul & Randal Savage/Golden Grain Trucking Co., App. No. P-66336 (August 1983).

The only way to secure Commission approval of the use of a business name is through the procedures that the legislature and agency rules have established for doing so. A citizen may not rely on the statement of an agency employee when that is not the proper way to get the agency's official view. WAC 480-12-030; estoppel. In re Cascade Movers of Washington, Inc., Docket No. P-78560 (October 1996).

A Superior Court decision in a factually different case, which the Commission is appealing, does not collaterally estop the Commission from deciding similar issues in other cases. Estoppel. WUTC v. Waste Management of Spokane, Inc., Docket No. TG-920090, Fifth Supplemental Order (January 1993).

When there is no determination by the Commission that a service agreement is legally sufficient as a contract, a grant of temporary authority does not prevent or estop the Commission from examining the issue in a parallel application for continuing authority. Estoppel; WAC 480-12-255. Order M. V. No. 135278, In re G. J. Daniels, Inc., d/b/a Daniels Moving and Storage, App. No. P-69994 (January 1987).

A letter sent by Commission staff that erroneously indicates that an application will be granted creates no rights in the applicant. The application may subsequently be denied for inconsistency with the public interest. Estoppel; RCW 81.80.170; WAC 480-12-033. Order M. V. No. 134871, In re Keener's, Inc., d/b/a K & N Meats, App. No. P-70607 (October 1986).

Resolution of an issue in an application for temporary authority does not determine the resolution of an issue in an ensuing application for continuing authority. The purposes of the applications are different, and their resolutions are based on differing standards. A grant of temporary authority does not provide a basis for asserting estoppel against the Commission on similar issues in the context of an application for continuing authority. Estoppel; WAC 480-12-033. Order M. V. No. 133958, In re James R. Tolin d/b/a Punctual Transportation, App. No. P-68274 (April 1986).

A grant of temporary authority does not estop the Commission from denying a parallel application for continuing authority on any issue that is similar between the two applications. Applications for temporary authority do not resolve issues in an ensuing application for continuing authority. Estoppel; RCW 71.94.165<sup>\*</sup>; Former WAC 480-08-250; WAC 480-12-033. Order M. V. No. 133958, In re James R. Tolin d/b/a Punctual Transportation, App. No. P-68274 (April 1986).

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<sup>\*</sup> repealed

The mere statement of a Commission employee to a person whose permit has been cancelled for cause,

## **Estoppel**

that he "...can probably get the permit reinstated..." does not prevent the Commission from denying an application for reinstatement of the permit. Estoppel; WAC 480-12-065. Order M. V. No. 133363, In re Seafair Moving & Transfer, Inc., App. No. P-69394 (February 1986).

It is not inconsistent with a carrier's authority to include in an application for authority a portion of authority already held, or to decline to pursue any portion of an application. A carrier that declines to pursue authority after an agreement with another carrier has not bargained away any authority it already has and is not estopped in another action from demonstrating its authority. Estoppel. Order M. V. No. 132782, In re C. A. Slatten d/b/a Southwest Delivery Co., Inc., App. No. E-851 (November 1985).

Reissuance of a carrier's currently-held continuing authority does not estop the Commission from finding an applicant unfit for an extension of authority. Under RCW 34.04.010(3) and 34.04.170(2) the Commission could not deny the renewal of the applicant's continuing authority without a show cause proceeding. Estoppel; Former RCW 34.04.010. Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

Letters sent to the presiding officer, but not entered into the record, do not form a basis for estoppel. The presiding officer's mere receipt of the letters does not constitute official Commission action or manifest injustice upon which the applicant relied to its detriment. Estoppel; Former RCW 34.04.090(1). Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

## **Chapter 23B.15 RCW**

### **FOREIGN CORPORATIONS**

A foreign corporation must register with Washington State under Chapter 23B.15 prior to conducting intrastate operations. Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).

## **FORMER CHAPTER 34.04 RCW**

### **ADMINISTRATIVE PROCEDURE ACT**

(Superseded July 1, 1989, by Chapter 34.05 RCW)\*

#### **Former 34.04.010 Definitions**

Rules are unnecessary for the implementation of statutes that do not require the exercise of Commission discretion, when existing Commission procedures provide adequate protections to potentially affected parties. Former RCW 34.04.010(2); RCW 81.04.160; RCW 81.80.290. Order M. V. No. 138133, In re Metro Hauling, Inc., App. No. E-19614 (August 1988). Related filings: Order M. V. No. 138134, In re Great Northern Truck Express, Inc., App. No. E-19633 (August 1988); Order M. V. No. 138132, In re Erdahl Brothers Trucking, Inc., App. No. E-19653 (August 1988); Order M. V. No. 138357, In re Action Express, Inc., App. No. E-19642 (November 1988).

Reissuance of a carrier's currently-held continuing authority does not estop the Commission from finding an applicant unfit for an extension of authority. Under Former RCW 34.04.010(3) and 34.04.170(2) the Commission could not deny the renewal of the applicant's continuing authority without a show cause proceeding. Estoppel; Former RCW 34.04.010. Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

#### **Former RCW 34.04.080     **Declaratory ruling by agency--Petition--Court review.****

When a petition for declaratory order is on referral from federal court, when the federal court specifies a procedure for resolving differences among parties to the federal action as to the statement of issues, and when one party failed to use the procedure, the Commission did not err in failing to enter an alternative declaratory order based upon that party's contentions. Former RCW 34.04.080. In re ITT Rayonier, Cause No. TV-2030 (May 1988).

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\* See Index for references to current procedural statutes and rules.

## **Former Chapter 34.04 RCW**

### **Former RCW 34.04.090      Contested cases--Notice--Hearing--Informal disposition--Record--Findings of fact--Agency's powers.**

#### **Cross References**

- < Notice of Hearing: See also Former WAC 480-08-140.
- < Reconsideration: See also Former RCW 81.04.165; Former WAC 480-08-250.
- < Standing to Protest: See also Former WAC 480-08-040; WAC 480-12-045.
- < Voluntary Settlement: See Former WAC 480-08-110.
- < Weight Given Proposed Order's Credibility Assessments: See Former WAC 480-08-240 under "Review/Final Decision."
- < Withdrawal of Application After Entry of Proposed Order: See this ' '.
- < **See Index for references to current procedural sections.**

A party to a proceeding has the opportunity to come forward with evidence demonstrating the exact nature of any claims it may have, and its failure to do so can lead to a conclusion that it has not made a prima facie case. Former RCW 34.04.090(2). Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

A finding that states a witness' opinion does not amount to a finding that the witness is a qualified expert, nor does it constitute a finding as to either the verity of the opinion or the weight it should be accorded. Former RCW 34.04.090. Order M. V. G. No. 1367, In re Northwest Unitech, Inc., App. No. GA-864 (January 1989).

The Commission will not allow withdrawal of an application after entry of a proposed order when there has been no showing of good cause. Former RCW 34.04.090. Order M. V. No. 237089, In re Diamond Transportation Services, Inc., d/b/a Diamond Cab Co., and/or Diamond Courier Service, App. No. E-19470 (December 1987).

Petitions for reconsideration are authorized by Former RCW 34.04.090 and Former WAC 480-08-250. The repeal of RCW 81.04.165, setting forth specific requirements for petitions for reconsideration in matters under Title 81, did not deprive the Commission of authority to receive and consider petitions for reconsideration but merely permitted it under law to promulgate its own specific requirements for those petitions. Order M. V. G. No. 1309, In re Richard D. Clevenger, d/b/a Clevenger Sanitation, App. No. GA-827 (November 1987).

The Commission must limit its Findings of Fact to evidence of record. RCW 81.04.120; Former RCW 34.04.090(7). Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

Findings of Fact are not required when there are no disputed issues. Former RCW 34.04.090; Former WAC 480-08-240(13). Order M. V. No. 136858, In re United Couriers Northwest, Inc., App. No. P-70574 (October 1987).

**Former RCW 34.04.090 (cont.)**

When the extent of a protestant's authority is insufficient for the needs of many of the supporting shippers, such a fact is relevant to a proceeding and should be included in the findings. Former RCW 34.04.090; Former WAC 480-08-240(13). Order M. V. No. 136729, In re Raymond O. Daniel, d/b/a P D Xpress, App. No. P-70454 (October 1987).

An order need not recite as a found fact every bit of information to which a witness testifies. A finding is sufficient if it deals with all dispositive issues and is supported by the evidence. Former RCW 34.04.090; Former WAC 480-08-240(13). Order M. V. No. 136729, In re Raymond O. Daniel, d/b/a P D Xpress, App. No. P-70454 (October 1987).

A finding in a proposed order that merely recites parties' contentions is not subject to attack on the basis that hearsay evidence refutes those contentions. Former RCW 34.04.090; Former WAC 480-08-240(13). Order M. V. No. 136729, In re Raymond O. Daniel, d/b/a P D Xpress, App. No. P-70454 (October 1987).

A finding in a proposed order that notes that a subpoena was served and that a party complied in part will be adopted when the party challenges only the purpose of the subpoena and not the accuracy of the finding. Former RCW 34.04.090; Former WAC 480-08-240(13). Order M. V. No. 136729, In re Raymond O. Daniel, d/b/a P D Xpress, App. No. P-70454 (October 1987).

Filing a valid protest confers party status and accords a protestant the right to contest any issue that may adversely affect its interest. A parcel delivery carrier may participate fully in an application for unrestricted general freight authority. Former RCW 34.04.090(2); Former WAC 480-08-040(4); WAC 480-12-045(3). Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).

Granting an applicant's request to withdraw his application after entry of a proposed order is discretionary with the Commission. When the applicant offers no reasons why the Commission should dismiss the application rather than affirm the proposed denial, a decision affirming the denial is proper. Former RCW 34.04.090; WAC 480-12-045. Order M. V. No. 135801, In re F. Allen Forler d/b/a A. F. Excavating, App. No. P-70777 (April 1987).

A finding by a presiding officer that an applicant's assertions of fitness are not credible--because the applicant received 233 citations in a period of two months and the evidence indicates that violations have occurred since then--that is well reasoned and supported by substantial evidence, will be affirmed. Former RCW 34.04.090(7); RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 134065, In re Sun Transportation Co., Inc., App. No. P-68362 (May 1986).

A request to withdraw an application for transfer after entry of a conditional final order may be granted when withdrawal is not inconsistent with Commission rule or policy or with the public interest. Former RCW 34.04.090(9)(i). Order M. V. No. 130552, In re John R. Potter d/b/a John Potter Hauling/Edward Walter Waser d/b/a Ed's Rock, App. No. P-68188 (October 1984).

**Former RCW 34.04.090 (cont.)**

A mere citation to WAC 480-12-255(7) that is included in a notice of hearing in a contract carrier application does not apprise all parties of the possibility of a classification inquiry as part of the hearing.

## **Former Chapter 34.04 RCW**

The classification issue may not be considered in the resulting hearing. Former RCW 34.04.090 (1). Order M. V. No. 129708 In re Interstate Distributors, Co., App. No. E-18925 (May 1984).

Letters sent to the presiding officer, but not entered into the record, do not form a basis for estoppel. The presiding officer's mere receipt of the letters does not constitute official Commission action or manifest injustice upon which the applicant relied to its detriment. Estoppel; Former RCW 34.04.090(1). Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

An interlocutory order granting an amendment to an application but denying a motion to dismiss protests is within the jurisdiction of the presiding officer but is subject to review by the Commission. Former RCW 34.04.090(9)(i). Order M. V. No. 126916, In re Blackburn Truck Lines, Inc., App. No. E-18631 (August 1983).

When the Commission affirms a proposed order without comment, it does not adopt the language or the reasoning of the proposed order for precedential purposes. Former RCW 34.04.090(9)(i). Order M. V. No. 126825, In re Lynden Transport, Inc. d/b/a Milky Way, Inc., App. No. E-18534 (January 1983).

When all parties were assembled, the applicants were advised of the proceedings, and no parties' rights were finally adversely determined thereby, the presiding officer did not exceed discretion in denying a motion for an interlocutory review of a procedural ruling. Former RCW 34.04.090(9)(g). Order M. V. No. 126852, In re Delta Trucking Co., Inc./Thorndike Trucking, Inc., App. No. P-66283 (December 1982).

### **Former RCW 34.04.100 Contested cases--Rules of evidence--Cross examination.**

#### **Cross References**

- < Evidence, Rules of: See Former WAC 480-08-190.
- < Notice of Hearing: See also Former WAC 480-08-140.
- < Reconsideration: See also Former RCW 81.04.165; Former RCW 34.04.090; Former WAC 480-08-250.
- < Reopening to Present New Evidence After Hearing: See Former WAC 480-08-010.
- < Reopening to Present New Evidence On Reconsideration: See Former WAC 480-08-240.
- < Review of Initial Orders: See Former WAC 480-08-240.
- < Standing to Protest: See Former WAC 480-08-040; WAC 480-12-045.
- < Voluntary Settlement: See Former WAC 480-08-110.
- < Weight Given Proposed Order's Credibility Assessments: See Former WAC 480-08-240 under "Review/Final Decision."
- < Withdrawal of Application After Entry of Proposed Order: See Former RCW 34.04.090.
- < **See Index for references to current procedural rules.**

#### **Former RCW 34.04.100 (cont.)**

**Appellate decision.** The Administrative Law Judge properly considered protestants' testimony when applicant's representative had full opportunity to cross-examine the witness. Former RCW 34.04.100. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** An exhibit is highly relevant to the issue of applicant's propensity to obey

## Former Chapter 34.04 RCW

Washington's regulations when it contains documents recording 233 violations, and many of the documents are copies of applicant's own records. Former RCW 34.04.100; RCW 81.80.070 (entry common carriers: fitness). Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** Determining whether new service would serve the public interest or is required by present or future public convenience and necessity, is particularly within the Commission's expertise. Former RCW 34.04.100(4); RCW 80.01.040. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

The Commission must decide each case based upon the evidence presented in that case. Former RCW 34.04.100; Former WAC 480-08-240(13). Order M. V. No. 138234, In re Inter-run, Inc., d/b/a Inter-run, App. No. P-71544 (August 1988).

Evidence in a contested case will ordinarily be accepted only in an open hearing session where the witness is subject to questioning and observation of demeanor. Affidavits offered as appendices to exceptions, without a motion to reopen and a showing that reopening to receive new evidence is appropriate, are subject to a motion to strike. Former RCW 34.04.100; Former WAC 480-08-190; Former WAC 480-08-240. Order M. V. No. 133428, In re Dale Locke/Brader Hauling Service, Inc., App. No. P-68902 (February 1986).

The Commission will not consider evidence submitted by the protestant showing operations outside protestant's certificate authority. Former RCW 34.04.100; RCW 81.68.040; Former WAC 480-08-190. Order M. V. C. No. 1495, In re Pacific Northwest Transportation Services, Inc.; Bremerton-Kitsap Airporter, Inc. d/b/a The Sound Connection, Kitsap-Sea-Tac Airporter; Travel-lines, Inc., App. Nos. D-2468; D-2469; D-2473 (May 1985).

Information cited in exceptions that does not appear in the hearing record will not be considered by the Commission. The hearing is the place where evidence must be produced. Former RCW 34.04.100(2); Former WAC 480-08-240. Order M. V. No. 126351, In re Bill N. Sheely, App. No. E-18621 (September 1982).

### **Former RCW 34.04.110**

### **Contested cases--Procedure when deciding officials have not heard or read evidence.**

#### **Cross References**

- < Review of Proposed Orders: See Former WAC 480-08-240 under Review; Final Orders
- < Weight Given to Proposed Order's Credibility Assessments: See Former WAC 480-08-240 under "Review/Final Decision."
- < Withdrawal of Application After Entry of Proposed Order: See Former RCW 34.04.090.
- < **See Index for references to current procedural sections.**



## **Former Chapter 34.04 RCW**

When an application is not protested, the decision is adverse to no party to the proceeding and the applicant waives a proposed order, the Commission may enter a final order without the prior entry of a proposed order by the administrative law judge. Former RCW 34.04.110; Former WAC 480-08-240. Order S. B. C. No. 444, Port Angeles Launch Service, App. No. B-301 (July 1988).

When the findings of fact and conclusions of law are supported by substantial evidence and resolve all determinative issues, exceptions alleging that the presiding officer did not consider all the testimony and that the findings of fact are insufficient to support a grant of partial authority will be denied. Former RCW 34.04.110; Former WAC 480-08-240. Order M. V. No. 130688, In re Earl Burton Marsh d/b/a Earl Marsh, App. No. P-68008 (November 1984).

The mere act of affirming a proposed order to which no exceptions have been taken, without a discussion of the issues therein, does not indicate an intention by the Commission to adopt the policies stated in the proposed order. Former RCW 34.04.110; Former WAC 480-08-240. Order M. V. G. No. 1185, In re Snoking Garbage Co., Inc./R.S.T. Disposal Co., Inc., App. No. GA-788 (November 1984).

When a superior court has remanded a case for review of an applicant's fitness, the Commission may examine both the record of the first hearing and the record of the hearing on remand. Former RCW 34.04.110; Former WAC 480-08-240(13). Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

It is the responsibility of the Commission to exercise its own judgment on facts brought out at hearing but, when there is substantial evidence to support the findings of a proposed order, they should not be lightly rejected. Former RCW 34.04.110; Former WAC 480-08-240(13). Order M. V. No. 126090, In re Brown Line, Inc., App. No. E-18461 (September 1982).

### **Former RCW 34.04.120      Contested cases--Adverse decisions and orders [Form of and Service]-- Findings and conclusions.**

#### **Cross References**

- < Review of Proposed Orders: See Former WAC 480-08-240.
- < Service by Commission: See Former WAC 480-08-060(4).

A denial of authority based on the lack of financial viability of a service should be based upon specific evidence and should cite reasons. Former RCW 34.04.120; RCW 81.80.070 (contract carriers). Order M. V. No. 139493, In re Jim Elsbree, d/b/a J & P Trucking, App. No. P-71880 (May 1989).

#### **Former RCW 34.04.120 (cont.)**

A proposed order need not contain findings that are irrelevant. Unless an application is being denied upon public interest grounds, an order denying common carrier authority need not include a specific finding that the grant of the additional common carrier authority will harm the transportation facilities of the state. Former RCW 34.04.120; Former WAC 480-08-240. Order M. V. No. 139284, In re Tom Dyksterhuis, d/b/a Valley Molasses Co., App. No. P-71984 (March 1989).

It is generally inappropriate to state a witness' opinion in a finding unless that opinion is relevant to in an ultimate finding. Former RCW 34.04.100(1); Former WAC 480-08-240(6). Order M. V. G. No. 1367, In re Northwest Unitech, Inc., App. No. GA-864 (January 1989).

When a Commission order fails to make a numbered finding that an applicant's operation of vehicles in two classes of operations is in the public interest, though the issue was discussed in the order, the Commission will grant reconsideration and add the finding. Former RCW 34.04.120; RCW 81.80.260; Former WAC 480-08-250. Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

**Former RCW 34.04.130      Contested cases--Judicial review.**

**Appellate decision.** When the entire record, considered as a whole, demonstrates that shippers' support of an application was based on a preference--either for applicant's driver, for a small carrier generally, or simply for an additional carrier--and applicant has failed to show the required services cannot be provided by existing carriers, then the Commission's decision denying authority was not clearly erroneous. Former RCW 34.04.130(5) and (6); RCW 81.80.070 (entry common carriers: need for service). Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** Past illegal conduct per se is not a bar to granting an application, but the breadth of applicant's unlawful conduct, and the finding that applicant's promises of future compliance were not credible, together show that the Commission's determination of unfitness was not clearly erroneous. Former RCW 34.04.130(6); RCW 81.80.070 (entry common carriers: fitness). Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** Before a court may hold findings, conclusions or decisions of an administrative agency "clearly erroneous," it must determine that even though there may be substantial evidence to support the agency's action or substantial evidence to the contrary, the court is, on the entire evidence, "left with the definite and firm conviction that a mistake has been committed." Former RCW 34.04.130(6). Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** The court may not substitute its judgment for that of the agency, but must give deference to the expertise of the administrative tribunal. Former RCW 34.04.130. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Former RCW 34.04.130 (cont.)**

**Appellate decision.** A determination of the Commission should not be overturned by the court when the WUTC has acted within the scope of its expertise and competence and is supported by material evidence in the record. Former RCW 34.04.130. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** Under the error of law standard of former RCW 34.04.130(6)(d) for reviewing administrative action, a reviewing court may substitute its view of the law for that of the administrative agency. Former RCW 34.04.130. Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992). (reversing Commission Order M. V. G. No. 1403, Mason County Garbage Company v. Harold LeMay Enterprises, Cause No. TG-2163 (August 1989)).

Filing a petition for reconsideration tolls the time for seeking judicial review until issues raised by the

## **Former Chapter 34.04 RCW**

petition, including its sufficiency, are resolved. Former RCW 34.04.130. Order M. V. G. No. 1415, In re Seattle Disposal Company, d/b/a Rabanco Companies, App. No. GA-846 (February 1990).

### **Former 34.04.140      Appeal to supreme court.**

**Appellate decision.** Appellate courts are in the same position as the superior court in reviewing administrative decisions. Former RCW 34.04.140; RCW 81.04.190. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

### **Former RCW 34.04.170      Provisions applicable to licenses and licensing.**

Upon denial of an application for continuing authority, the applicant's temporary authority would not expire until the last day for seeking review of the Commission order, or at a later date to be set by order of the reviewing court. Former RCW 34.04.170. Order M. V. G. No. 1415, In re Seattle Disposal Company, d/b/a Rabanco Companies, App. No. GA-846 (February 1990).

When the Commission enters a final order denying an application for permanent authority, the temporary permit expires on the last day for seeking judicial review of that order. Only when the reviewing court specifically sets a later expiration date does the temporary permit continue beyond the last day for seeking review of a Commission final order. Former RCW 34.04.170; RCW 34.05.422; WAC 480-12-033(3). Order M. V. No. 140505, In re Jobbers Freight Service, Inc., App. No. P-70386 (December 1989).

A holder of a temporary permit issued in conjunction with an application for continuing authority has until the last day for seeking review of a Commission order denying continuing authority to obtain an order staying cancellation of the temporary permit during its appeal. Former RCW 34.04.170(1). Order M. V. No. 138723, In re Island Empire Distribution Systems, Inc., App. No. P-69452 (December 1988).

## **CHAPTER 34.05 RCW**

### **ADMINISTRATIVE PROCEDURE ACT**

#### **RCW 34.05.010 Definitions.**

A letter from the Commission secretary does not announce a Commission policy inconsistent with a prior order when it merely declines to take discretionary action, deals with a different company on different facts not expressed in the letter, is not an interpretive or policy statement, is not a declaratory order, and is not the result of an adjudication. RCW 34.05.230; 34.05.010(15); 34.05.240; WAC 480-09-200; 480-09-230. Order M. V. G. No. 1533, In re Sure-Way Incineration, Inc., App. No. GA-868 (February 1992).

The Commission is not required to promulgate rules when existing law may be applied to accomplish the process for which the rules are proposed. RCW 34.05.010(15); WAC 480-09-220. Order M. V. No. 140681, In re Action Express, Inc., App. No. E-19642 (December 1989); Order M. V. No. 140688, In re Joy Motor Freight, Inc., App. No. E-19688 (December 1989); Order M. V. No. 140698, In re Erdahl Brothers Trucking, Inc., App. No. E-19653 (December 1989); Order M. V. No. 140700, In re Okanogan-Seattle Transport Co., Inc., App. No. E-19689 (December 1989).

#### **RCW 34.05.060 Informal settlements.**

##### **Cross Reference**

< Settlement: See WAC 480-09-465.

The Commission cannot dictate that parties voluntarily resolve their differences, or prevent them from choosing any procedures and pursuing any remedies that are legally available, but in light of the State's policy that settlement is encouraged in lieu of litigation of administrative issues, it is proper for the Commission to encourage a settlement process. This is particularly so when delay in resolving a matter may adversely affect public safety. RCW 34.05.060; WAC 480-09-465. Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088; TR-931089; & TR-931090 (Consolidated) (January 1994).

When it appears to the Commission that it is essential for the parties to begin communicating in a way that allows them to share information, to discover areas in which they agree, and to provide a forum for narrowing differences and opportunities for reaching consensus in areas in which they disagree, it may direct Commission Staff to engage the parties in dialogue and to schedule meetings at which the parties may discuss the issues freely and off the record. RCW 34.05.060; WAC 480-09-465. In re Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088, TR-931089, TR-931090 (December 1993).

The Commission will accept a stipulated settlement resolving all material issues in a case, when it finds that the settlement is consistent with the public interest. RCW 34.05.060; WAC 480-09-465. Order M. V. No. 141281, Quality Transportation Service, Inc./Czyhold Truck Lines, Inc., Hearing No. P-71961; Order M. V. No. 141280, Quality Transportation Service, Inc./Easley Hauling Service, Inc., Hearing No. P-71959; Order M. V. No. 141282, Quality Transportation Service, Inc./Brader Hauling Service, Inc., Hearing No. P-71963 (May 1990).

## **Chapter 34.05 RCW**

### **RCW 34.05.230 Interpretive and policy statements.**

A letter from the Commission secretary does not announce a Commission policy inconsistent with a prior order when it merely declines to take discretionary action, deals with a different company on different facts not expressed in the letter, is not an interpretive or policy statement, is not a declaratory order, and is not the result of an adjudication. RCW 34.05.230; 34.05.010(15); 34.05.240; WAC 480-09-200; 480-09-230. Order M. V. G. No. 1533, In re Sure-Way Incineration, Inc., App. No. GA-868 (February 1992).

### **RCW 34.05.240 Declaratory order by agency--Petition--Court review.**

#### **Cross Reference**

<Declaratory Orders: See WAC 480-09-230.

### **RCW 34.05.416 Decision not to conduct an adjudication.**

RCW 34.05.416 allows the Commission to decline to conduct an adjudication in response to an application. Order M. V. No. 145732, In re A to Z Services, Inc., d/b/a A to Z Zippy Delivery, App. No. P-76324 (October 1992).

The Commission may make a preliminary decision under RCW 81.04.200 and RCW 34.05.416 whether a petition for rehearing should be rejected or should be set for hearing. RCW 81.04.200; 34.05.416; WAC 480-09-820. Order M. V. G. No. 1533, In re Sure-Way Incineration, Inc., App. No. GA-868 (February 1992).

### **RCW 34.05.422 Rate changes; licenses.**

Motions addressed to a carrier's temporary authority must take place in the docket of the temporary authority. RCW 34.05.422; WAC 480-70-130. Order M. V. G. No. 1669, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (November 1993).

Upon denial of an application for continuing authority, the applicant's temporary authority would not expire until the last day for seeking review of the Commission order, or at a later date to be set by order of the reviewing court. RCW 34.05.422(3). Order M. V. G. No. 1415, In re Seattle Disposal Company, d/b/a Rabanco Companies, App. No. GA-846 (February 1990).

When the Commission enters a final order denying an application for permanent authority, the temporary permit expires on the last day for seeking judicial review of that order. Only when the reviewing court specifically sets a later expiration date does the temporary permit continue beyond the last day for seeking review of a Commission final order. Former RCW 34.04.170; RCW 34.05.422; WAC 480-12-033(3). Order M. V. No. 140505, In re Jobbers Freight Service, Inc., App. No. P-70386 (December 1989).

**RCW 34.05.434 Notice of hearing.**

Allegations of nonreceipt of the notice of hearing will not support remand for a new hearing in the absence of objective evidence that the service of the notice was incomplete. RCW 34.05.434; 34.05.437. Order M. V. No. 143626, In re White Rose Transport, Inc., App. No. P-74475 (July 1991).

**RCW 34.05.437 Pleadings, briefs, motions, service.**

Allegations of nonreceipt of the notice of hearing will not support remand for a new hearing in the absence of objective evidence that the service of the notice was incomplete. RCW 34.05.434; 34.05.437. Order M. V. No. 143626, In re White Rose Transport, Inc., App. No. P-74475 (July 1991).

The Commission will reject a petition for reconsideration that does not include a certificate showing service of the petition upon all parties. RCW 34.05.437; WAC 480-09-120; WAC 480-09-810. Order M. V. No. 142172, WUTC v. K-Lines, Inc., Hearing No. H-4990 (October 1990).

A certificate of service form, properly completed, is prima facie evidence supporting a finding of service, absent contrary objective evidence. RCW 34.05.437; RCW 81.04.430. Order M. V. No. 141617, In re Donald Richard and Donald Eugene Steele, d/b/a D & D Trucking, App. No. E-19965 (July 1990).

Service upon "all parties" includes the assistant attorney general; valid service of a pleading requires a correct certificate of service. RCW 34.05.437; WAC 480-09-120(1)(c); WAC 480-09-120(2)(d); WAC 480-09-410. Order M. V. G. No. 1412, In re R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal & Seattle Disposal Company, d/b/a Rabanco Companies, App. Nos. GA-845 & GA-851, respectively (January 1990).

The Commission may disregard a protest that was not properly served on the applicant's attorney of record and may consider the application ex parte. RCW 34.05.437; WAC 480-12-045(6). Order M. V. No. 140715, In re H & K Trucking, Inc., d/b/a North Pacific Transport, App. No. P-72756 (January 1990).

When the name and address of an applicant's attorney is published in the weekly docket, any protest to the application must be served upon the attorney; service upon the applicant alone is not sufficient. RCW 34.05.437(3); WAC 480-09-120(2)(a); WAC 480-12-045(3)(a). Order M. V. No. 140715, In re H & K Trucking, Inc., d/b/a North Pacific Transport, App. No. P-72756 (January 1990).

**RCW 34.05.440 Default.**

**Cross References**

< Hearings--Failure to Appear: See WAC 480-09-700.  
See WAC 480-12-045.

**RCW 34.05.443 Intervention.**

**Cross References**

< Intervention: See WAC 480-09-430.

## **Chapter 34.05 RCW**

### **RCW 34.05.449 Procedure at hearing.**

#### **Cross References**

- < Procedure at Hearing: See also WAC 480-09-735 & -736.
- < Protestant--Extent of Participation: See WAC 480-12-045.
- < **See Index for references to prior procedural rules.**

When a citizen alleges that a governmental body=s representative at hearing, who had apparent authority to appear for the governmental body, had no actual specific authority to appear on its behalf, but the governmental body had notice of the hearing and the initial order resulting from the hearing and has made no objection at any point, the governmental body has ratified the appearance and the Commission has no jurisdiction to determine whether a specific person lawfully acts as agent for the governmental body. RCW 34.05.449; WAC 480-09-710. Union Pacific Railroad Company v. Spokane County, Docket No. TR-950176 (July 1996).

### **RCW 34.05.452 Rules of evidence--Cross-examination.**

Hearsay evidence is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452. Order M. V. C. No. 1978, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia/Sea-Tac Airporter Express, App. No. D-75018 (September 1992).

Relevant testimony, otherwise proper, will not be stricken. RCW 34.05.452; WAC 480-09-740. Order M. V. No. 141041, In re Silver Eagle Company, App. No. E-19774 (March 1990).

### **RCW 34.05.455 Ex parte communications.**

Communications involving a pending case must be served on all parties, and service must be certified to the Commission. RCW 34.05.455; WAC 480-09-140; WAC 480-09-120. Order M. V. No. 145517, In re Star Moving & Storage, Inc./United Couriers, App. No. P-73707 (September 1992).

**RCW 34.05.461 Entry of orders.**

**Cross References**

< Weight Given to Initial Order's Credibility Findings: See RCW 34.05.464.

A party's withdrawal without explanation after presenting its evidence does not affect the Commission's ability to consider evidence of record presented by the party in discussing and resolving the issues in the proceeding. RCW 34.05.461; WAC 480-12-045. Order M. V. No. 146358, In re Steve Karabach, d/b/a Steve Karabach Trucking, App. No. E-76408 (April 1993).

A finding that testimony was given is not a finding that the subject of the testimony exists as a fact, and may be stricken on review. RCW 34.05.461; 34.05.464; WAC 480-09-780. Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).

Mislabeling a finding as a conclusion or vice versa does not affect the validity of an order. RCW 34.05.461. WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446 (March 1992).

An initial order may be omitted and a final order entered by the Commission when an initial order has been waived by the applicant and all protests were withdrawn prior to the hearing. RCW 34.05.461; WAC 480-12-045. Order M. V. No. 143580, In re Diane I. Burke, d/b/a M & D Burke Trucking, App. No. E-74672 (July 1991).

A proposed finding of fact upon which no conclusion of law is based, and which is not shown to be relevant to the decision, should be deleted from the final order. RCW 34.05.461(4); WAC 480-09-780. Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990).

When proposed findings of fact fail to support the proposed conclusion drawn from them, the Commission will review the evidence independently and, if it determines that the proposed findings are erroneous in light of the record as a whole, make its own findings of fact. RCW 34.05.461(4); WAC 480-09-780. Order M. V. No. 141041, In re Silver Eagle Company, App. No. E-19774 (March 1990).

Although an applicant has the burden of demonstrating its fitness, once it has made a prima facie showing, contrary evidence must be sufficiently specific and detailed to overcome that showing. RCW 34.05.461(4); RCW 81.80.070 (entry common carriers: fitness). Order M. V. No. 141006, In re Becker Trucking, Inc., d/b/a Becker Trucking; Becker Express, App. No. E-19787 (March 1990).

An applicant's assurances of future compliance with Commission rules and laws may be found credible, notwithstanding past unauthorized hauls, when the applicant has discontinued the unauthorized hauls and has applied for the necessary authority. RCW 34.05.461; RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).

**RCW 34.05.464 Review of initial orders.**

**Cross references**

< Review of Initial Orders: See WAC 480-09-780.



## Chapter 34.05 RCW

- < Required Form and Contents of a Petition for Review: See WAC 480-09-780.
- < Timeliness of Petition for Review: See WAC 480-09-780.
- < Findings Based on Credibility Shall Be So Identified: See RCW 34.05.464.
- < **See Index for references to prior procedural rules.**

### **--- Weight Given to Initial Order's Credibility Assessments**

The Commission places considerable reliance on a presiding officer's credibility evaluation. RCW 34.05.464.

Order M. V. No. 14623, In re Washington State Recovery Service, Inc., App. No. P-75864 (March 1993).

Order M. V. No. 144441, In re Expedited Express, Inc., App. No. P-74573 (January 1992).

Order M. V. No. 142726, In re Saber Azizi, d/b/a Fast Courier & Assoc., App. No. P-73605 (April 1991).

The Commission places considerable reliance on the credibility findings of the administrative law judge who was present to hear the witnesses and view their presentation of the evidence. RCW 34.05.464. Docket No. TC-910789, Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc., d/b/a Shuttle Express (March 1993).

When there is substantial objective evidence contrary to a finding of fitness, the Commission may reject the initial order's finding of the applicant's good faith. RCW 34.05.461; 34.05.464; WAC 480-09-780. Order M. V. No. 145700, In re Becker Trucking, Inc., App. No. E-74675 (October 1992).

The Commission may properly adopt findings that are supported by the record and specifically found credible by the presiding officer. RCW 34.05.461; 34.05.464; WAC 480-09-780. Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).

In reviewing the findings of fact of an initial order, the Commission will generally give deference to the administrative law judge's assessments of credibility. RCW 34.05.461; 34.05.464(4); WAC 480-09-780. Order M. V. No. 143915, In re Janicki Logging Co., Inc., App. No. E-74600 (September 1991).

The Commission will give due consideration to an administrative law judge's conclusions regarding a witness' credibility; however, if the applicant's testimony is inconsistent with the company's actions, and substantial objective evidence shows an unwillingness or inability to comply with regulatory requirements, the Commission will not adopt the proposed findings or conclusions. RCW 34.05.464; WAC 480-09-780. Order M.V.G. No. 1451, In re Sure-Way Incineration, Inc., App. No. GA-868 (November 1990).

**RCW 34.05.464 (cont.)**

The Commission may view the record to determine whether objective evidence contradicts a finding of fitness. RCW 34.05.461(3); RCW 34.05.464(4); RCW 81.80.070 (entry common carriers: fitness). Order M. V. No. 141581, In re Gary Merlino Construction Co., Inc., App. No. E-19841 (June 1990).

The Commission will generally give deference to the Administrative Law Judge's credibility findings unless the record contains objective evidence that would warrant rejecting the proposed findings. RCW 34.05.464. Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

**--- Voluntary Dismissal After Initial Order**

**Cross reference**

< Withdrawal of application: See WAC 480-12-045.

The Commission does not grant voluntary dismissal of a proceeding as a matter of right after entry of an initial order, but will consider whether dismissal is consistent with the public interest. RCW 34.05.464; WAC 480-09-780.

Order M. V. G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993).

Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express, Docket No. TC-910789 (January 1993).

If a protested application has gone to hearing and an initial order has been entered, the Commission does not allow withdrawal as a matter of right. It will consider public interest factors to determine whether to grant the dismissal. RCW 34.05.464; WAC 480-09-780. Order M. V. No. 147301, In re Anders Distribution, Inc., App. No. P-77055 (December 1993).

After a protested motor carrier application has gone to hearing and an initial order has been entered, an applicant is not entitled to withdraw its application as a matter of right. The Commission ordinarily will deny an applicant's request for voluntary dismissal at that stage in the proceedings and will proceed to enter a final order. RCW 34.05.464; WAC 480-12-045; 480-09-780. Order M. V. No. 146406, In re Lilac City Express, Inc., App. No. E-76179 (April 1993).

When a private complaint presents real issues, results from a real controversy, has completed all procedural stages except final order, involves issues of interest to the industry or the public, and when a request for voluntary dismissal is based only on the respondent's purchase of the complainant, the Commission will deny dismissal and will enter an order resolving the issues. RCW 34.05.464; WAC 480-09-780. Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express, Docket No. TC-910789 (January 1993).

**RCW 34.05.464 (cont.)**

The Commission may review the merits of any initial order before entering a final order. RCW

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34.05.464; WAC 480-09-780(7). Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

Dismissing a complaint proceeding after an initial order calls for an exercise of discretion and is not a matter of right. RCW 34.05.464; 81.04.110; WAC 480-09-780. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

The Commission is not prohibited from resolving issues, even if the parties no longer contest them. RCW 34.05.464; 81.04.120; WAC 480-09-780. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

### **RCW 34.05.467 Stay.**

The Commission may stay the effect of an order when there is a need to preserve the status quo pending the Commission's resolution of a petition for reconsideration. RCW 34.05.467; WAC 480-09-800. Order M.V.G. No. 1654, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (August 1993).

The Commission may lift its stay of the effect of a final order if the parties have not met the conditions of the stay. RCW 34.05.467; WAC 480-09-800. Order M. V. G. No. 1646, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (July 1993).

The Commission may stay the effect of an order to avoid disruptions to customers and to allow time to prepare additional procedures. RCW 34.05.467; WAC 480-09-800. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

A petition for stay should demonstrate irreparable harm; patent error in a final order such that reconsideration will almost certainly be granted; or substantial hardship combined with substantial possibility that the order will be modified. RCW 34.05.467; WAC 480-09-800. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Order Denying Stay (December 1991).

The Commission will not stay a final order for an indefinite time while the industry presents proposed regulatory changes, when a stay would not affect efforts to present the proposed changes and when no other benefit is shown. RCW 34.05.467; WAC 480-09-800. Order M. V. No. 141967, In re United Couriers, Inc., App. No. E-19716 (March 1990).

**RCW 34.05.470 Reconsideration.**

**Cross References**

- < Reconsideration of Final Orders: See WAC 480-09-810.
- < **See Index for references to prior procedural rules.**

**RCW 34.05.473 Effectiveness of orders.**

A Commission order is effective upon entry. The Commission will ordinarily not wait to see whether it will be affirmed on judicial review before implementing the order. RCW 34.05.473. Order M. V. G. No. 1444, In re Rainier Disposal Co., Inc./ R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-842; Snoking Garbage Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-843 (February 1991).

**RCW 34.05.482 Brief adjudicative proceedings--Applicability.**

**Cross References**

- < Brief Adjudicative Proceedings: See WAC 480-09-500.

**RCW 34.05.491 Brief proceedings---Administrative review--Procedures.**

The State administrative procedure act, chapter 34.05 RCW, provides for judicial review of brief adjudications. RCW 34.05.491. In re Cascade Movers of Washington, Inc., Docket No. P-78560 (October 1996).

**RCW 34.05.550 Stay and other temporary remedies.**

The burden is on the applicant to request the reviewing court to stay the expiration of a temporary permit during the pendency of an appeal. RCW 34.05.467. Order M. V. No. 140505, In re Jobbers Freight Service, Inc., App. No. P-70386 (December 1989).

**RCW 34.05.570 Judicial review.**

**Appellate decision.** Unchallenged administrative findings of fact are accepted as verities by a reviewing court. Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992). RCW 34.05.570; 81.04.170.

**RCW 34.05.574 Type of relief.**

The Commission will comply with the direction of the Court of Appeals to restore prior authority to a solid waste collection company that has prevailed on appeal from an adverse final Commission order. RCW 34.05.574; 81.77.040. Order M. V. G. No. 1599, Mason County Company v. Harold LeMay Enterprises, Cause No. TG-2163 (January 1993).

## CHAPTER 35.13 RCW

### ANNEXATION OF UNINCORPORATED AREAS

**RCW 35.13.280      Cancellation, acquisition, of franchise or permit for operation of public service business in territory annexed.**

When an application for transfer of a solid waste permit is granted, duplicating authority and authority canceled by operation of law should be deleted to reflect the existence of one unified permit and to avoid problems with improper separate alienation. RCW 35.13.280; 35A.14.900; 81.77.040; WAC 480-70-110. Order M. V. G. No. 1444, In re Rainier Disposal Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-842; Snoking Garbage Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-843 (February 1991).

When a city adopts an ordinance and enters into a franchise agreement with a garbage and refuse collection company, temporary authority issued by the Commission to serve territory annexed by the city is superseded and canceled as of the effective date of the agreement. RCW 35.13.280; RCW 81.77.020. Order M. V. G. No. 1414, In re Superior Refuse Removal Corporation, App. No. GA-899 (January 1990).

In the absence of an affirmative decision by the municipality to contract with a carrier or to provide garbage collection services, the Commission must regulate authority within the territory annexed by the municipality. RCW 35.13.280; RCW 81.77.020. Order M. V. G. No. 1414, In re Superior Refuse Removal Corporation, App. No. GA-899 (January 1990).

A city's failure to grant a franchise pursuant to RCW 35.13.280 or RCW 35A.14.900, does not affect the statutory cancellation of a garbage or refuse carrier's certificate in annexed territory. RCW 35.13.280; RCW 35A.14.900. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

When a garbage or refuse carrier is awarded a franchise in annexed territory pursuant to RCW 35.13.280 or RCW 35A.14.900 but fails to provide service pursuant to the franchise, the carrier has waived its rights in the franchise; and when the city ends its solid waste utility, that unserved territory is available for a grant of authority by the Commission. RCW 35.13.280; RCW 35A.14.900; RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Annexation by city of any territory cancels any certificate authorizing garbage collection services within the annexed territory. When an applicant for temporary authority submits reliable information that there are numerous relevant annexations involving considerable territory and when no protestant has come forward to state objections as to territory of its operation, the evidence is sufficient to demonstrate a lack of service in the annexed territory. RCW 35.13.280. Order M. V. G. No. 1280, In re R. S. T. Disposal Co., Inc. d/b/a Tri-Star Disposal, App. No. GA-844 (April 1987).

**CHAPTER 35A.14 RCW**  
**ANNEXATION BY CODE CITIES**

**RCW 35A.14.900    Cancellation, acquisition of franchise or permit for operation of public service business in territory annexed.**

When an application for transfer of a solid waste permit is granted, duplicating authority and authority canceled by operation of law should be deleted to reflect the existence of one unified permit and to avoid problems with improper separate alienation. RCW 35.13.280; 35A.14.900; 81.77.040; WAC 480-70-110. Order M. V. G. No. 1444, In re Rainier Disposal Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-842; Snoking Garbage Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-843 (February 1991).

When a garbage or refuse carrier is awarded a franchise in annexed territory pursuant to RCW 35.13.280 or RCW 35A.14.900 but fails to provide service pursuant to the franchise, the carrier has waived its rights in the franchise; and when the city ends its solid waste utility, that unserved territory is available for a grant of authority by the Commission. RCW 35.13.280; RCW 35A.14.900; RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

A city's failure to grant a franchise pursuant to RCW 35.13.280 or RCW 35A.14.900, does not affect the statutory cancellation of a garbage or refuse carrier's certificate in annexed territory. RCW 35.13.280; RCW 35A.14.900. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

**CHAPTER 36.58 RCW**  
**[COUNTIES] SOLID WASTE DISPOSAL**

The transportation of leachate from a landfill to a wastewater treatment plant is not exempt from Commission regulation under RCW 36.58.050. RCW 36.58.050; 81.77.030. Order M. V. G. No. 1738, In re Sumas Transport, Inc., App. No. GA-77479 (December 1994).

## **CHAPTER 47.60 RCW**

### **PUGET SOUND FERRY AND TOLL BRIDGE SYSTEM**

#### **RCW 47.60.120 Other crossings--Infringement of existing franchises--....**

RCW 47.60.120, the statute which prohibits private ferry crossings within ten miles of a state ferry crossing over Puget Sound unless the WUTC grants a waiver from the restriction, does not grant the Commission power unilaterally to grant a waiver to permit private ferry service that would compete directly with Washington State Ferries routes or replace those routes. RCW 47.60.120; RCW 81.84.020. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (February 1997).

A proposal for private ferry service is not eligible for waiver under RCW 47.60.120 if it would impose substantial detriment on the Washington State Ferries through disruption of the statutory, multi-agency planning processes. RCW 47.60.120; RCW 81.84.020. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (February 1997).

RCW 47.60.120 gives the Commission a complementary role with the other elements of planning and operating all of the coordinated public and private elements of the ferry system, but not the power unilaterally to overrule or to impose drastic change on that system. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (February 1997).

The Commission may, after hearing, grant a waiver of the ten-mile restriction in RCW 47.60.120(1) in an application for authority to provide ferry service when it determines that the waiver is not detrimental to the public interest after consideration of factors including the impact on the Washington state ferry system and the impact on transportation congestion mitigation and air quality improvement. RCW 47.60.120; RCW 81.84.020. Order S.B.C. No. 519, In re Mosquito Fleet Enterprises, Inc., App. No. B-78420 (March 1996).

The Commission will grant a steamboat application under chapter 81.84 RCW when the applicant is qualified, the service is required by the public convenience and necessity and the proposed service is not in violation of RCW 47.60.120. RCW 81.84.010; 47.60.120. Order S. B. C. No. 483, In re Mosquito Fleet Enterprises, Inc., d/b/a Mosquito Fleet, App. No. B-317 (January 1991).

## **CHAPTER 70.95 RCW**

### **SOLID WASTE MANAGEMENT--REDUCTION AND RECYCLING**

The Commission has sole authority to establish rates for certificated solid waste companies, and no statute gives a county authority to set rates, or to require carriers to request specific rates from the Commission. RCW 70.95.090; 70.95.900; 81.77.030. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

While RCW 81.77.030(5) instructs the Commission to require compliance with local solid waste plans, RCW 70.95.090 contains a very specific list of the elements that should be included in such plans, and the Commission is not obligated to enforce elements that are not included in RCW 70.95.090. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

The Commission requires certificate holders under Chapter 81.77 RCW to use rate structures consistent with the solid waste management priorities set forth under RCW 70.95.010. RCW 70.95.010; 81.77.030. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585 (March 1994).



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## CHAPTER 80.01 RCW

### UTILITIES AND TRANSPORTATION COMMISSION

#### **RCW 80.01.040 General powers and duties of commission.**

**Appellate decision.** Determining whether new service would serve the public interest or is required by present or future public convenience and necessity, is particularly within the Commission's expertise. RCW 34.04.100(4); RCW 80.01.040. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

In interpreting a statute, the Commission may not consider affidavits of individual legislators. RCW 80.01.040. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (February 1997).

When a literal interpretation of a statute leads to a strained or absurd result, a statute should be construed to effect its purpose. RCW 80.01.040; 81.84.010. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

Until a federal law that would preempt the state's regulation of a category of intrastate transportation becomes effective, the Commission is bound to continue to implement the state's law, but it may take into consideration events at the national level in doing so. RCW 80.01.040; 81.80.070. Order M. V. No. 148152, In re Beasley Construction, Inc., App. No. P-77709 (August 1994).

The traditional test for determining whether motor freight transportation of valuable commodities between two points in the same state is intrastate traffic or is a leg in an interstate movement is the shippers' fixed and persisting intent at the time of shipment. RCW 80.01.040; 81.77.030. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

If no permit authorizing operations has been issued, the filing of a petition for bankruptcy ordinarily does not operate as a stay of an ongoing permit application process. RCW 80.01.040. Order M. V. No. 144397, In re Safco Safe Transport, Inc., App. No. P-73623 (December 1991).

The Commission will not grant authority to an applicant who proposes to operate in violation of law. RCW 80.01.040(2); RCW 81.80.070 (entry common carriers: fitness). Order M. V. No. 142136, Quad Enterprises, Inc./Group IV, Inc., Hearing No. P-73257 (December 1990).

The Commission is not obliged to suggest cures for an insufficient application or to promulgate rules to accommodate such a deficiency. RCW 80.01.040. Order M. V. No. 142136, Quad Enterprises, Inc./Group VI, Inc., Hearing No. P-73257 (December 1990).

The Commission may restrictively amend an auto transportation company's certificate of authority, to prohibit the company from operating in areas where the company has willfully and repeatedly violated Commission orders. RCW 80.01.040(2); RCW 81.04.110; RCW 81.68.030. Order M. V. C. No. 1893, Evergreen Trails, Inc. v. San Juan Airlines, Inc., Docket No. TC-900407 (November 1990).

## Chapter 81.01 RCW

### **RCW 80.01.040 (cont.)**

The Commission has jurisdiction to investigate all tariff revision filings; whether the proposed rate changes are the result of increased "pass through" expenses or other reasons is not material. RCW 80.01.040. WUTC v. Sanitary Service Company, Inc., Cause No. TG-2275 (December 1989).

Unless a city exercises its right to provide for solid waste utility service within its boundaries, city ordinances affecting elements of waste collection service within the Commission's jurisdiction are mere statements of policy and are not mandatory upon carriers. City ordinances cannot supersede state law vesting jurisdiction in the Commission. RCW 80.01.040; RCW 81.77.030. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

The Commission does not have the power to declare unconstitutional a law of the state of Washington. RCW 80.01.040. Order M. V. G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Unless a common carrier application is denied upon public interest grounds, the order need not include findings that the grant of additional authority would harm the transportation facilities of the state. RCW 34.04.120; RCW 80.01.045; WAC 480-08-240. Order M. V. No. 139284, In re Tom Dyksterhuis, d/b/a Valley Molasses Co., App. No. P-71984 (March 1989).

The Commission may determine whether solid waste transportation the statutes may be constitutionally applied to a Oregon company doing business in Washington. Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974), does not prevent the Commission from determining the constitutionality of its statutes as they are applied in particular instances. RCW 80.01.040; RCW 81.77.100. Cause No. TG-1911 In re Evergreen Waste Systems (May 1986).

Authority from the Commission is permissive and non-supersessive. A permit issued by the Commission cannot authorize an activity that is otherwise made unlawful by a valid exercise of the police power; but permit restrictions that would allow a city to restrict the materials authorized for transportation would create unnecessary uncertainty between differing jurisdictions and would not enhance the city's ability to exercise its power. RCW 80.01.040; RCW 81.77.020; RCW 81.77.100. Order M. V. No. 133753, In re Sunshine Disposal, Inc., d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986).

When statutory policy, as interpreted by the courts, directs the Commission to apply certain standards the Commission may not apply new standards. RCW 80.01.040. Cause TR-1148, In re Campbell Road (September 1985).

Transportation of mobile homes from a factory in Oregon to the sales lot of the supporting shipper in Washington, or to a customer of the supporting shipper, appears to be part of a continuous movement in interstate commerce; interstate commerce is not subject to Commission regulation and will not support a grant of authority. RCW 80.01.040(2). Order M. V. No. 129374, Henry E. Ford d/b/a Mobile Home Specialists, App. No. E-18870 (March 1984).

## **CHAPTER 81.04 RCW**

### **REGULATIONS--GENERAL**

#### **RCW 81.04.010 Definitions.**

An operation that advertises itself to the general public to transport property for compensation over the highways of the state of Washington, provides the equipment for conducting such operation, hires and controls personnel who conduct such transportation, does conduct such transportation, and collects money for providing that transportation, is a common carrier. RCW 81.04.010; 81.80.010. Order M. V. No. 144905, In re Michael P. Shanks, a/k/a Mike The Mover, Hearing No. H-5006 (April 1992).

The Commission will consider the totality of an operation in determining its nature, rather than labels applied to its parts, or the structure of the operations. The Commission will not permit subterfuges or unlawful arrangements to cloud the true nature of operations or to control regulatory treatment. RCW 81.04.010; 81.80.010. Order M. V. No. 144905, In re Michael P. Shanks, a/k/a Mike The Mover, Hearing No. H-5006 (April 1992).

#### **RCW 81.04.110 Complaints--Hearings.**

If the Commission allows proposed tariff changes to take effect by operation of law, a formal complaint against the rates is an appropriate means for a person to challenge the justness and reasonableness of the rates. RCW 81.04.130; 81.04.110; 81.28.230; WAC 480-09-400. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585 (March 1994).

The Commission may enter a cease and desist order under RCW 81.04.510 only when the Commission itself has initiated the proceeding. The Commission cannot enter a cease and desist order in a private complaint proceeding brought under RCW 81.04.110. RCW 81.04.110; 81.04.510. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

Dismissing a complaint proceeding after an initial order calls for an exercise of discretion and is not a matter of right. RCW 34.05.464; 81.04.110; WAC 480-09-780. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

Operating airporter service while owning only bus authority can support rehearing. It can also support a complaint under RCW 81.04.110; 81.04.200; 81.68.040; WAC 480-09-820. Order M. V. C. No. 1935, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways to Reddy Leasing, Inc. d/b/a Bellingham Sea-Tac Airporter, App. No. D-75052 (November 1991).

The Commission may restrictively amend an auto transportation company's certificate of authority, to prohibit the company from operating in areas where the company has wilfully and repeatedly violated Commission orders. RCW 80.01.040(2); RCW 81.04.110; RCW 81.68.030. Order M. V. C. No. 1893, Evergreen Trails, Inc. v. San Juan Airlines, Inc., Docket No. TC-900407 (November 1990).

#### **RCW 81.04.110 (cont.)**

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Issues related to the respondent's performance cannot be resolved in the complainant's application proceeding, but may be raised in a separate formal complaint. RCW 81.04.110. Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (November 1990).

When a complaint is unclear and imprecise, it is not known whether the complainant is in competition with respondent carriers, and some of the matters alleged have no competitive impact on the complainant, the complaint should be dismissed. RCW 81.04.110; WAC 480-08-050(11). Midland Transportation, Inc./H & K Transport, Inc., and Art Nordang Trucking, Inc., Cause No. TV-2037 (February 1988).

The Commission may rule on an issue that is technically moot, provided that the issue is of general interest and the issue was thoroughly argued and constituted an actual controversy. RCW 81.04.110. Order M. V. No. 135089, In re E. C. Browne, d/b/a A-N Auction Transport, App. No. P-69188 (December 1986).

The Commission will accept a stipulation settling a complaint against a carrier that results in substantial penalty, saves the expense of a hearing, and sufficiently protects the public interest. RCW 34.04.090(4); RCW 81.04.110; RCW 81.04.405. Hearing Nos. H-4949; TV-1898, WUTC v. Joe Sicilia, Inc.; Bi-County Trucking, Inc. et al., v. Joe Sicilia (October 1986).

The Commission may dismiss an order instituting an investigation of garbage ratemaking methodologies if a general method of determining garbage carrier rates may be inappropriate to the industry. RCW 81.04.110; RCW 81.77.030. Cause TG-1994, In re Use of a Fair Rate of Return and/or Fair Rate of Return or Closely Related Methodology for Garbage and Refuse Collection Service (October 1986).

The Commission will sever hearings previously consolidated upon satisfaction of the issue for which consolidation was ordered. RCW 81.04.110. Order M. V. No. 134637, In re Cartin Delivery Service, Inc.; In re William and Deryn Fulton/Cartin Delivery Service, Inc., App. Nos. E-19099; P-70196 (September 1986).

The Commission may, on its own motion, consider matters of general interest that are raised by a deficient petition for reconsideration. RCW 81.04.110; RCW 81.04.210; WAC 480-08-250. Order M. V. No. 129300, In re Loren Bowen d/b/a Twalmica Trucking, App. No. P-67233 (February 1984).

### **RCW 81.04.120 Hearings--Order--Record.**

#### **Cross References**

< Entry of Orders: See RCW 34.05.461; Former WAC 480-08-240

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- < Procedure at Hearing: See WAC 480-09-735 & 480-09-736; Former RCW 34.04.090.
- < Review of Initial Orders: See RCW 34.05.464; WAC 480-09-780; Former WAC 480-08-240.
- < Weight Given to Initial Order's Credibility Assessments: See RCW 34.05.464.

The Commission is not prohibited from resolving issues, even if the parties no longer contest them. RCW 34.05.464; 81.04.120; WAC 480-09-780. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

The Commission must limit its Findings of Fact to evidence of record. RCW 34.09.090(7); RCW 81.04.120. Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

The Commission is not prohibited from resolving issues even in the absence of a contest by parties. The withdrawal of a protest a week after the Commission entered a final order does not affect the proceeding and is not grounds for reconsideration. RCW 81.04.120; RCW 81.04.410. Order M. V. No. 133954, In re Container Systems, Inc., App. No. P-69051 (April 1986).

Due process requires that the one who decides must hear the evidence, whether through personal participation or through review of the record made before other authorized personnel. RCW 34.04.090(7); RCW 81.04.120; WAC 480-08-240(13). In re Sunshine Disposal, Inc., d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986).

### **RCW 81.04.130 Suspension of tariff changes.**

#### **Cross Reference**

- < Ratemaking: See RCW 81.28.230.

**Appellate decision.** The Commission does not have authority under RCW 81.16.030, under its general statutory powers, or under its general ratemaking authority to examine the financial records of an unregulated company affiliated with a regulated company if there is no contract or arrangement between the affiliated company and the regulated company, regardless of the fact that the ratepayer fees flow to the affiliated company. Waste Management v. WUTC, 123 Wn.2d 621 (1994), reversing WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446, Fourth Supplemental Order (March 1992).

If the Commission allows proposed tariff changes to take effect by operation of law as provided in RCW 81.04.130, a Commission order is neither required nor entered. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585 (March 1994).

### **RCW 81.04.130 (cont.)**

If the Commission allows proposed tariff changes to take effect by operation of law, a formal complaint against the rates is an appropriate means for a person to challenge the justness and reasonableness of the rates. RCW 81.04.130; 81.04.110; 81.28.230; WAC 480-09-400. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585

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(March 1994).

Procedural avenues that are available to review orders in adjudicative proceedings, such as reconsideration, are not available to review discretionary actions of the Commission. RCW 81.04.130; WAC 480-09-810; WAC 480-09-815. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585 (March 1994).

Generally, if a public service company refuses to provide information needed to support a finding that its proposed tariff is fair, just, reasonable or sufficient, the Commission may reject the tariff. RCW 81.04.130; 81.28.230. WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446, Fourth Supplemental Order (March 1992), reversed on other grounds, Waste Management v. WUTC, 123 Wn.2d 621 (1994).

A public service company must be prepared to establish that every reasonable effort has been made to minimize the costs of providing service. RCW 81.28.230. WUTC v. Sanitary Service Company, Inc., Cause No. TG-2275 (December 1989).

In order to allow for possible changes in actual landfill closure costs as they might deviate from estimates, and to see that regular customers pay no more than their appropriate share of actual closure costs, the Commission will require respondents to file a report every six months concerning progress of landfill closure activities, details of expenditures of closure funds and details of amounts accrued during the reporting period and closure cost reserve funds. RCW 81.28.230. WUTC v. Twin City Sanitary Service, G-65, Vancouver Sanitary Service, G-65 and Buchmann Sanitary Service, Inc., G-79, Cause Nos. TG-2152, TG-2153 and TG-2154 (September 1988).

When a garbage company files tariff revisions for its commercial customers and interim rate relief is granted, the Commission may not force the company to waive the suspension period for the permanent rates. RCW 81.04.130. WUTC v. Skamania County Sanitary Service, Inc., Cause No. TG-2108 (April 1988).

### **RCW 81.04.160 Rules and regulations.**

The Commission need not promulgate rules to implement RCW 81.80.410 because the statute does not require the exercise of discretion. The action contemplated by the statute is limited to extending only the territorial boundary of carriers' authority, and existing Commission procedures provide adequate protection to potentially affected carriers. RCW 81.04.160. Order M. V. No. 140484, In re Metro Hauling, Inc., App. No. E-19614 (November 1989).

### **RCW 81.04.160 (cont.)**

Rules are unnecessary for the implementation of statutes that do not require the exercise of Commission discretion, when existing Commission procedures provide adequate protections to potentially affected parties. Former RCW 34.04.010(2); RCW 81.04.160; RCW 81.80.290. Order M. V. No. 138133, In re Metro Hauling, Inc., App. No. E-19614 (August 1988). Related filings: Order M. V. No. 138134, In re Great Northern Truck Express, Inc., App. No. E-19633 (August 1988); Order M. V. No. 138132, In re Erdahl Brothers Trucking, Inc., App. No. E-19653 (August 1988); Order M. V. No. 138357, In re

Action Express, Inc., App. No. E-19642 (November 1988).

**Former RCW 81.04.165 (repealed 1986) Reconsideration of orders--Review.**

A petition for reconsideration that is filed late, is not served on all parties of record, and requests that the Commission consider evidence outside of the hearing record, will be denied. Former RCW 81.04.165; WAC 480-08-250. Order M. V. No. 134610, In re Fin-A-Key Express, Inc., App. No. P-68437 (August 1986).

Petitions for reconsideration that merely contend that the evidence of record was not adequately considered by the Commission will be denied. Former RCW 81.04.165; WAC 480-08-250. Cause No. TV-1831, Increased Rates in WUTC Tariff No. 4-A, Item 860, Logs All Species (May 1986).

When findings in a final order were consistent with the record and were appropriate on the evidence, a petition for reconsideration will be denied. Former RCW 81.04.165; WAC 480-08-250. Order M. V. No. 133838, In re Inland Empire Distribution Systems, Inc., App. No. P-69280 (April 1986).

Without a demonstration that a matter previously argued and resolved against the petitioner was improperly framed or incorrectly decided on the law, a petition for reconsideration will be denied. Former RCW 81.04.165; WAC 480-08-250(2). Order M. V. No. 133958, In re James R. Tolin d/b/a Punctual Transportation, App. No. P-68274 (April 1986).

When an error in a final order is corrected in a subsequent Commission order, the time for filing a petition for reconsideration runs from the date of the correcting order. Former RCW 81.04.165; Former WAC 480-08-240(13). Order M. V. No. 130126, In re T & T Milk Transport, Inc., App. No. E-18817 (August 1984).

A petition for an extension of time to supplement a petition for reconsideration, filed within the statutory time limit, may be granted only when the petition for reconsideration shows some merit and when sufficient reason is stated for the extension. Former RCW 81.04.165. Order M. V. No. 129635, In re Susan Schlosser and Peggy Blake d/b/a The Paper Jogger, App. No. P-67065 (May 1984).

The Commission may, on its own motion, consider matters of general interest that are raised by a deficient petition for reconsideration. Former RCW 81.04.165; WAC 480-08-250. Order M. V. No. 129300, In re Loren Bowen d/b/a Twalmica Trucking, App. No. P-67223 (February 1984).

**Former RCW 81.04.165 (cont.)**

A petition for reconsideration will be rejected when it was filed 17 days after the entry of a final order, the statutory requirement is 10 days, the petition is not late due to Commission action, and no effort was made to obtain an extension on the time for filing the petition. Former RCW 81.04.165. Order M. V. No. 127318, In re Amalgamated Services, Inc., App. No. P-66973 (March 1983).

**RCW 81.04.170 Review of orders.**

**Appellate decision.** Unchallenged administrative findings of fact are accepted as verities by a reviewing court. Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992). RCW 34.05.570;



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81.04.170.

### **RCW 81.04.190 Appeal to supreme court.**

**Appellate decision.** Appellate courts are in the same position as the superior court in reviewing administrative decisions. RCW 34.04.140; RCW 81.04.190. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

### **RCW 81.04.200 Rehearings before commission.**

#### **Cross References**

< Petition for Rehearing: See WAC 480-09-820.  
See former WAC 480-08-250.

Rehearing is not an appropriate mechanism to address an issue which was known to the petitioner at a time provided for raising such matters, and which petitioner chose not to raise. RCW 81.04.200; WAC 480-09-820. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (March 1997).

A petition for rehearing must show changed circumstances or injurious results not anticipated by the Commission at the time the final order was entered. RCW 81.04.200; WAC 480-09-820(1). Order M. V. No. 141271, In re Becker Trucking, Inc. d/b/a Becker Trucking; Becker Express, App. No. 19787 (April 1990).

Without a demonstration that reopening or rehearing to receive additional evidence is proper, evidence submitted after a hearing will be rejected. RCW 81.04.200; RCW 81.04.410. Order M. V. No. 132952, In re Brett & Son, Inc., App. No. E-19072 (November 1985).

A complaint alleging that an unauthorized airporter service is being run in violation of an earlier Commission order, provides a sufficient basis for rehearing. RCW 81.04.200; WAC 480-08-250. Order M. V. C. No. 1371, In re Tacoma Suburban Lines, Inc., App. No. D-2408 (September 1982).

**RCW 81.04.200 (cont.)**

When a petition for rehearing is filed, and the language in a certificate appears inappropriate based on current Washington State highway designations, the Commission may on its own motion add review of the language of the certificate to the issues to be considered on rehearing. RCW 81.04.200; RCW WAC 480-08-250. Order M. V. C. No. 1371, In re Tacoma Suburban Lines, Inc., App. No. D-2408 (September 1982).

The Commission may decide a petition on the basis of the issues presented, and is not confined by the title of the petition. A petition for reopening will be denied unless it offers allegations of surprise, or evidence not reasonably available to petitioner at the time of hearing. RCW 81.04.200; WAC 480-08-050(6). Order S.B.C. No. 398, In re Island Ferry, Inc., App. No. B-277 (August 1982).

**RCW 81.04.210 Commission may change orders.**

**Cross References**

< Amendment or Rescission of Order by Commission: See also WAC 480-09-815.

When the Commission inadvertently grants more authority than the applicant seeks, or more authority than the Commission found proper, the Commission will correct the permit to reflect the true measure of authority sought and found proper. RCW 81.04.210. Order M. V. C. No. 1985, In re Sharyn Pearson & Linda Zepp d/b/a Centralia/Sea-Tac Airport Express, App. No. D-75018 (October 1992).

Alteration of an order under RCW 81.04.210 is improper when the element sought to be altered is based on findings of fact and conclusions of law not shown to be erroneous which are inconsistent with the proposed alteration. RCW 81.04.210; WAC 480-09-815. Order M. V. G. No. 1533, In re Sure-Way Incineration, Inc., App. No. GA-868 (February 1992).

The Commission will dismiss its complaint against a carrier for failure to maintain requisite insurance, if that carrier provides sufficient evidence of insurance prior to entry of a final order; the Commission will rescind the initial order of cancellation, dismiss the complaint, and reinstate the carrier's certificate of authority. RCW 81.04.210; WAC 480-12-065; WAC 480-12-350. Order M. V. C. No. 1879, WUTC v. American Indian Elders, Hearing No. H-4993 (August 1990).

When fairness requires that additional evidence be accepted, and that a revised initial order be entered, the Commission may grant a petition for remand to the Administrative Law Judge. RCW 81.04.210; WAC 480-09-815; WAC 480-09-820(2). Order M. V. No. 140997, In re A Mobile Home Doctor, Inc., App. No. P-72744 (March 1990).

When a carrier was inadvertently issued a permit in an ex parte action with less authority than intended, the Commission will correct the permit to reflect the true measure of authority intended to be granted. RCW 81.04.210. Order M. V. No. 132783, In re C. A. Slatten d/b/a Southwest Delivery, General Order No. 60 (November 1985).

**RCW 81.04.210 (cont.)**

When the Commission inadvertently grants more authority than applied for, the Commission will reopen the hearing record and correct the error. RCW 81.04.210. Order M. V. No. 132377, In re Sartin

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Construction and Trucking, Inc., App. No. E-18805 (August 1985).

When statements in the memorandum portion of a final order and in the findings of fact are erroneous, upon a petition for reconsideration they will be corrected. RCW 81.04.210; WAC 480-08-250. Order M. V. C. No. 1482, In re Pacific Northwest Transportation Services, Inc.; Bremerton-Kitsap Airporter, Inc. d/b/a The Sound Connection, Kitsap-Sea-Tac Airporter; Travelines, Inc., App. Nos. D-2468; D-2469; D-2473 (February 1985).

### **RCW 81.04.250 Determination of rates.**

When a public service company's refusal to provide information upon order of the Commission effectively bars the Commission Staff from fulfilling its statutory responsibility to investigate the company's rates, the Commission may reasonably infer that the withheld information would meet any Commission Staff burden of proof in effectively challenging the company's rates. RCW 81.04.250; 81.28.230. WUTC v. Waste Management of Spokane, Inc., Docket No. TG-920090, Fifth Supplemental Order (January 1993).

So long as tariff rates set by the Commission after hearing are neither so high so as to be unreasonable, nor so low as to be confiscatory, the Commission may set operating ratios at rates that will move over time as costs and revenues to the carriers change. A "Zone of Reasonableness" exists between the maximum and the minimum permissible rates within which the Commission may exercise discretion. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130. Cause No. TV-1831, Increased Rates in WUTC Tariff No. 4-A, Item 860 All Species, (May 1986).

The Commission may set rates that produce operating ratios that will move over time as the carrier's costs and revenue change, so long as the rates are neither so high as to be unreasonable, nor so low as to be confiscatory. A "zone of reasonableness" exists between the maximum and the minimum rates allowable, within which the Commission may exercise discretion. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130; WAC 480-12-295. Cause TV-1831, Increased Rates in WUTC Tariff No. 7-B (Bulk Petroleum), (February 1986).

The ultimate issue in a tariff filing is whether the proposed rates are fair, just, reasonable, and sufficient. When petroleum carriers can show, and staff investigation confirms, that a five percent increase in rates will provide an operating ratio within the approved range, the Commission will approve the requested increase. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130. Cause TV-1895, In re WUTC Tariff No. 7-B (Bulk Petroleum), (February 1986).

**RCW 81.04.380 Penalties--Violations by public service companies.**

Violation of a Commission order subjects a public service company to a potential penalty of up to \$1,000 per violation, with every day=s continuance being deemed a separate and distinct offense. RCW 81.04.380. In re Olympic Moving and Storage, Inc., d/b/a Olympic Movers (Formerly Cascade Movers of Washington, Inc.), Docket No. TV-971951 (July 1997).

A penalty under RCW 81.04.380 should equate with the seriousness of the offense, offer a disincentive to future violations, and demonstrate the magnitude of the Commission's concern about open and repeated violations. Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express, Docket No. TC-910789 (January 1993).

A penalty assessment will be made against a protestant who fails to appear at a scheduled hearing, when the protestant's failure to appear results in unnecessary appearances by others. RCW 81.04.380; 81.04.405; WAC 480-09-700; 480-12-045(4). Order M. V. No. 143651, In re Eppich Grain, Inc., App. No. E-74760 (July 1991).

The Commission may not assess a penalty for nonappearance at a hearing unless the nonappearing party is a public service company. RCW 81.04.380; 81.04.387; WAC 480-09-700; 480-12-045(4). Order M. V. No. 143355, In re Marjorie J., Brian L., and Robert E. Bent, d/b/a Bent and Sons, Inc., App. No. P-74294 (May 1991).

When a carrier has charged its customers rates in excess of its tariff, it is Commission practice in the case of multiple violations to impose only one penalty per shipment or, if the violations are ongoing, one penalty for each day's continued violation. RCW 81.04.380; RCW 81.04.405. Order M. V. G. No. 1360, WUTC v. Yakima Valley Disposal, Inc., Cause No. H-4975 (October 1988).

When a carrier does not contest the facts underlying a penalty assessment but instead contends that the company has new ownership, the carrier has not stated a basis for mitigation of the penalty. RCW 81.04.380; RCW 81.04.405. Order M. V. No. 132777, In re Coronet Enterprises, Inc., Penalty Assessment No. 3811 (November 1985).

**RCW 81.04.387 Penalties--Violations by other corporations.**

The Commission may not assess a penalty for nonappearance at a hearing unless the nonappearing party is a public service company. RCW 81.04.380; 81.04.387; WAC 480-09-700; 480-12-045(4). Order M. V. No. 143355, In re Marjorie J., Brian L., and Robert E. Bent, d/b/a Bent and Sons, Inc., App. No. P-74294 (May 1991).

**RCW 81.04.405 Additional penalties--Violations by public service companies and officers, employees, and agents thereof.**

A penalty assessment will be made against a protestant who fails to appear at a scheduled hearing, when the protestant's failure to appear results in unnecessary appearances by others. RCW 81.04.380; 81.04.405; WAC 480-09-700; 480-12-045(4). Order M. V. No. 143651, In re Eppich Grain, Inc., App. No. E-74760 (July 1991).

## **Chapter 81.04 RCW**

### **RCW 81.04.405 (cont.)**

A penalty assessment will be made against a party who fails to appear at a scheduled hearing, when that failure results in unnecessary appearances by other parties, the presiding officer, and the court reporter. RCW 81.04.405; WAC 480-09-700(3). Order M. V. No. 141617, In re Donald Richard and Donald Eugene Steele, d/b/a D & D Trucking, App. No. E-19965 (July 1990).

When a carrier has charged its customers rates in excess of its tariff, it is Commission practice in the case of multiple violations to impose only one penalty per shipment or, if the violations are ongoing, one penalty for each day's continued violation. RCW 81.04.380; RCW 81.04.405. Order M. V. G. No. 1360, WUTC v. Yakima Valley Disposal, Inc., Cause No. H-4975 (October 1988).

When the terms of a stipulation provide for a monetary penalty proportioned to the gravity of violations committed and assure against future violations, acceptance of the stipulation by the Commission is consistent with the public interest. RCW 81.04.405. Order M. V. No. 136510, In re Joe Sicilia, Inc., App. No. H-4969 (September 1987).

### **RCW 81.04.410 Orders and rules conclusive.**

If a special investigator's testimony is discussed and is completely and accurately summarized in the memorandum portion of the initial order, the Commission's failure to set out that testimony in a separately numbered finding of fact does not, alone, constitute grounds for reconsideration since the Commission considered the entire record in reaching its final decision. RCW 81.04.410; WAC 480-09-810. Order S. B. C. No. 472, In re Belairco, Inc., App. No. B-313 (August 1990).

An application for extension of common carrier authority is not a proper forum for a collateral attack upon a prior order of the Commission. RCW 81.04.410. Order M. V. No. 136856, In re Lynell Soloman, App. No. E-19441 (October 1987).

A Commission order may be challenged pursuant to statute through a petition for reconsideration; a petition for judicial review; or through a petition for rescission, modification or rehearing. When none of these procedures has been pursued, the validity of a prior order is presumed. RCW 81.04.410. Order M. V. No. 133363, In re Seafair Moving & Transfer, Inc., App. No. P-69394 (February 1986).

A change in Commission policy does not present circumstances requiring reconsideration of orders entered under the prior policy. RCW 81.04.410; WAC 480-08-250. Order M. V. No. 129473, In re LTI, Inc., d/b/a Milky Way, App. No. P-67741 (April 1984).

An applicant who voluntarily relinquished authority, in order to ensure that its operation would be consistent with Commission policy and to settle with protestants, may not receive reconsideration of an order entered after a change in Commission policy. RCW 81.04.410; WAC 480-08-250. Order M. V. No. 129473, In re LTI, Inc. d/b/a Milky Way, App. No. P-67741 (April 1984).

**RCW 81.04.430 Findings of department prima facie correct.**

**Appellate decision.** The Commission's findings are prima facie correct, and the burden is on the challenger to establish that the agency's decision is unlawful. RCW 81.04.430. Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

A certificate of service form, properly completed, is prima facie evidence supporting a finding of service, absent contrary objective evidence. RCW 34.05.437; RCW 81.04.430. Order M. V. No. 141617, In re Donald Richard and Donald Eugene Steele, d/b/a D & D Trucking, App. No. E-19965 (July 1990).

**RCW 81.04.510 Engaging in business or operating without approval or authority--Procedure.**

In a proceeding under RCW 81.04.510 to determine whether a company is engaged in operations without the necessary approval required by Title 81 RCW, the company has the burden of proving that its operations are not subject to the provisions of the title. RCW 81.04.510; 81.68.040. Order M. V. C. No. 2130, In re Apple Blossom Lines, Inc., Hearing No. H-5028 (April 1995).

The Commission may enter a cease and desist order under RCW 81.04.510 only when the Commission itself has initiated the proceeding. The Commission cannot enter a cease and desist order in a private complaint proceeding brought under RCW 81.04.110. RCW 81.04.110; 81.04.510. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

## **Chapter 81.16 RCW**

### **AFFILIATED INTERESTS**

#### **RCW 81.16.030 Payments to affiliated interest disallowed if not reasonable.**

**Appellate decision.** The Commission does not have authority under RCW 81.16.030, under its general statutory powers, or under its general ratemaking authority to examine the financial records of an unregulated company affiliated with a regulated company if there is no contract or arrangement between the affiliated company and the regulated company, regardless of the fact that the ratepayer fees flow to the affiliated company. Waste Management v. WUTC, 123 Wn.2d 621 (1994), reversing WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446, Fourth Supplemental Order (March 1992).

The bare testimony of a public service company's witnesses that there are no contracts or arrangements between it and a non-regulated affiliate is not sufficient to end the Commission's inquiry into transactions among affiliated companies. RCW 81.16.030. WUTC v. Waste Management of Spokane, Inc., Docket No. TG-920090, Fifth Supplemental Order (January 1993); see, Waste Management v. WUTC, 123 Wn.2d 621 (1994).

Partial benefit does not support the full level of expense paid to an affiliated interest. RCW 81.16.030; 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

## **CHAPTER 81.28 RCW**

### **COMMON CARRIERS IN GENERAL**

#### **RCW 81.28.010 Duties as to rates, services and facilities.**

##### **Cross Reference**

< Ratemaking: See RCW 81.04.130; 81.28.230.

"Cream skimming," selective service to the most lucrative accounts and avoidance of less lucrative or more expensive accounts to serve, is forbidden to regulated solid waste carriers. RCW 81.28.010; 81.77.070. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

#### **RCW 81.28.080 Published rates to be charged--Exceptions.**

There appears to be no exception for charitable institutions from the statutory ban against rebating. RCW 81.28.080; 81.28.180; 81.28.210. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

RCW 81.28.080 forbids a carrier from rebating any portion of a fare except pursuant to a Commission order. Having a commission payment form in the carrier's tariff filed under WAC 480-30-050(5) does not substitute for the statutory requirement. Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express, Docket No. TC-910789 (January 1993).

#### **RCW 81.28.180 Rate discrimination prohibited.**

There appears to be no exception for charitable institutions from the statutory ban against rebating. RCW 81.28.080; 81.28.180; 81.28.210. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

A complainant challenging a carrier's rates for violation of RCW 81.28.190, prohibiting unreasonable preferences, or RCW 81.28.180, prohibiting unequal charges for similar services, has the burden of demonstrating that a violation occurred. Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express, Docket No. TC-910789 (January 1993).



## **Chapter 81.28 RCW**

### **RCW 81.28.190 Unreasonable preferences prohibited.**

When a portion of certain customers' fees is returned for the benefit of those customers to a for-profit activity in which they have an interest, providing an effective reduction in rates not available to others, without any relationship to the value of services rendered, the Commission may reasonably conclude that the transaction is an illegal rebate in violation of RCW 81.28.190 and 81.28.210. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

A complainant challenging a carrier's rates for violation of RCW 81.28.190, prohibiting unreasonable preferences, or RCW 81.28.180, prohibiting unequal charges for similar services, has the burden of demonstrating that a violation occurred. Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express, Docket No. TC-910789 (January 1993).

When a broker impermissibly uses its bargaining power to obtain lower than authorized transportation rates from carriers, the broker is subject to penalty including possible loss of license. RCW 81.28.210; RCW 81.80.010(12); WAC 480-12-100(2). Order M. V. No. 130356, In re Continental Traffic Company, Inc., App. No. P-67117 (September 1984).

An applicant with limited common carrier authority (logs only), who seeks authority as a contract carrier of precast panels, in special equipment, will have no opportunity to afford an undue preference to its contracting shipper over its common carrier shippers and contract authority may be granted. RCW 81.28.190; RCW 81.80.070 (entry common carriers: preference); WAC 480-12-050(5). Order M. V. No. 127985, In re William P. LeVeaux d/b/a LeVeaux Trucking, App. No. P-66676 (July 1983).

### **RCW 81.28.210 Transportation at less than published rates--Rebating.**

There appears to be no exception for charitable institutions from the statutory ban against rebating. RCW 81.28.080; 81.28.180; 81.28.210. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

When a portion of certain customers' fees is returned for the benefit of those customers to a for-profit activity in which they have an interest, providing an effective reduction in rates not available to others, without any relationship to the value of services rendered, the Commission may reasonably conclude that the transaction is an illegal rebate in violation of RCW 81.28.190 and 81.28.210. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

Payments for asserted marketing services based on a percentage of business revenues do not constitute an unlawful rebate when paid by a shipper. RCW 81.28.210. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

**RCW 81.28.230 Commission to fix just, reasonable, and compensatory rates.**

**Cross Reference**

< Ratemaking: See also RCW 81.04.130.

**Appellate decision.** The Commission does not have authority under RCW 81.16.030, under its general statutory powers, or under its general ratemaking authority to examine the financial records of an unregulated company affiliated with a regulated company if there is no contract or arrangement between the affiliated company and the regulated company, regardless of the fact that the ratepayer fees flow to the affiliated company. Waste Management v. WUTC, 123 Wn.2d 621 (1994), reversing WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446, Fourth Supplemental Order (March 1992).

If the Commission allows proposed tariff changes to take effect by operation of law, a formal complaint against the rates is an appropriate means for a person to challenge the justness and reasonableness of the rates. RCW 81.04.130; 81.04.110; 81.28.230; WAC 480-09-400. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585 (March 1994).

When a public service company's refusal to provide information upon order of the Commission effectively bars the Commission Staff from fulfilling its statutory responsibility to investigate the company's rates, the Commission may reasonably infer that the withheld information would meet any Commission Staff burden of proof in effectively challenging the company's rates. RCW 81.04.250; 81.28.230. WUTC v. Waste Management of Spokane, Inc., Docket No. TG-920090, Fifth Supplemental Order (January 1993); see, Waste Management v. WUTC, 123 Wn.2d 621 (1994).

The Commission has recognized the unique cost structure of parcel delivery service, compared with general freight service; parcel service is less expensive to provide than general freight LTL service, and can be profitably provided at minimum rates substantially lower than LTL minimum rates. RCW 81.28.230. Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

When respondents' advertising expenses relate to a unique historical event, they are not ordinary and necessary operating expenses. RCW 81.28.230. WUTC v. Twin City Sanitary Service, G-65, Vancouver Sanitary Service, G-65 and Buchmann Sanitary Service, Inc., G-79, Cause Nos. TG-2152, TG-2153 and TG-2154 (September 1988).

Funds collected from regulated customers as landfill closure cost reserves will be excluded from consideration as operating income for purposes of determining the respondents' profit margin. RCW 81.28.230. WUTC v. Twin City Sanitary Service, G-65, Vancouver Sanitary Service, G-65 and Buchmann Sanitary Service, Inc., G-79, Cause Nos. TG-2152, TG-2153 and TG-2154 (September 1988).

## Chapter 81.28 RCW

### **RCW 81.28.230 (cont.)**

In a garbage application for temporary rate increases where an emergent need exists to accrue funds to meet landfill closure cost, only those funds that accrue to defray landfill closure costs should be included in the temporary rates. RCW 81.28.230. Twin City Sanitary Service, Vancouver Sanitary Service, Buchmann Sanitary Service, Inc., Cause Nos. TG-2152, TG-2153 and TG-2154 (April 1988).

A garbage carrier's insurance premiums are paid from ratepayer revenues the Commission is within its jurisdiction in requiring a carrier to report any insurance settlement or litigation result. RCW 81.28.230. WUTC v. Twin City Sanitary Service, G-65, WUTC v. Vancouver Sanitary Service, G-65, and WUTC v. Buchmann Sanitary Service, G-79, Cause Nos. TG-2152, TG-2153 and TG-2154 (March 1988).

So long as tariff rates set by the Commission after hearing are neither so high so as to be unreasonable, nor so low as to be confiscatory, the Commission may set operating ratios at rates that will move over time as costs and revenues to the carriers change. A "zone of reasonableness" exists between the maximum and the minimum permissible rates within which the Commission may exercise discretion. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130. Cause No. TV-1831; Increased Rates in WUTC Tariff No. 4-A, Item 860 All Species (May 1986).

The ultimate issue involved in a tariff filing is whether the proposed rates are fair, just, reasonable, and sufficient. When petroleum carriers can show, and staff investigations confirm, that a five percent increase in rates will provide an operating ratio within the approved range, the Commission will approve the increase requested. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130. Cause No. TV-1895, In re WUTC Tariff No. 7-B (Bulk Petroleum) (February 1986).

Brokers are fully subject to intrastate regulation, and a broker who uses its bargaining power to obtain illegally lower transportation rates will be subject to a penalty, including the possible loss of authority. RCW 81.28.230; RCW 81.80.010(12); WAC 480-12-100(5). Order M. V. No. 130356, In re Continental Traffic Company, Inc., App. No. P-67117 (September 1984).

Testimony that a supporting shipper would use the applicant if he were able to obtain a flat rate tariff quote, which is not now lawful in intrastate service, does not demonstrate a need for the applicant's services. RCW 81.28.230; WAC 480-12-100(2). Order M. V. No. 129662, In re Joyce Mazza & Hazel Gerber, d/b/a Action Brokerage, App. No. P-67597 (May 1984).

## CHAPTER 81.48 RCW

### RAILROADS--OPERATING REQUIREMENTS AND REGULATIONS

**RCW 81.48.015      Limiting or prohibiting the sounding of locomotive horns--Supplemental safety measures--Notice.**

The Commission may authorize a pilot study of the effectiveness of an alternative safety measure at a railroad grade crossing, subject to appropriate provision for Commission monitoring and review. RCW 81.48.015; Chapter 315, Laws of 1995; P.L. 103-440. Spokane County v. Burlington Northern Railroad Company, Docket No. TR-951218 (May 1996).

**RCW 81.48.030      Speed within cities and towns and at grade crossings may be regulated.**

Eliminating state-imposed speed limits for trains within the limits of cities and towns is not in the public interest, nor is it in the public interest to set state speed limits at the maximum allowed by the Federal Railroad Administration without reference to specific speeds. RCW 81.48.030; 81.48.040. In re Petition of The Burlington Northern and Santa Fe Railway Company and the National Railroad Passenger Corporation for Modification of Order Regulating the Speed of Passenger and Freight Trains in Castle Rock, Washington, Docket No. TR-970868 (July 1997).

The Commission may grant a petition to temporarily increase train speed limits within a city or town when it is in the public interest to do so and appropriate safety measures are followed. RCW 81.48.030; 81.48.040. In re Petition of The National Railroad Passenger Corporation for a temporary increase in speed limits in certain cities, Docket No. TR-971191 (July 1997).

The Commission has the exclusive right to set train speeds within the city limits of all cities and towns, except first class cities, and may grant proposed increases in train speed limits within a city if the proposed speeds are commensurate with the hazards presented by the operation of trains and the practical operation of the trains. RCW 81.48.030; 81.48.040.

In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation  
[Edmonds speed limits], Docket No. TR-940288 (April 1995).  
[Ferndale speed limits], Docket No. TR-940308 (April 1995).

The Commission will not condition approval of an increase in train speed limits on the building of a fence when the trespassing danger in the area is not so great as to constitute a local safety hazard not generally found in other areas and the increases sought in the maximum speed limit for trains are commensurate with the hazards presented and the practical operations of the trains. RCW 81.48.030; 81.48.040. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Ferndale speed limits], Docket No. TR-940308 (April 1995).

The Commission has the exclusive right to set train speeds within the city limits of all cities and towns, except first class cities, and may grant proposed increases in train speed limits within a city if the proposed speeds are safe and the operation of the trains will benefit from the speed limit increases. RCW 81.48.030; 81.48.040. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Mount Vernon speed limits], Docket No. TR-940250 (April 1995).

## Chapter 81.48 RCW

### **RCW 81.48.040 Procedure to fix speed limits--Change in limits.**

Eliminating state-imposed speed limits for trains within the limits of cities and towns is not in the public interest, nor is it in the public interest to set state speed limits at the maximum allowed by the Federal Railroad Administration without reference to specific speeds. RCW 81.48.030; 81.48.040. In re Petition of The Burlington Northern and Santa Fe Railway Company and the National Railroad Passenger Corporation for Modification of Order Regulating the Speed of Passenger and Freight Trains in Castle Rock, Washington, Docket No. TR-970868 (July 1997).

The Commission may grant a petition to temporarily increase train speed limits within a city or town when it is in the public interest to do so and appropriate safety measures are followed. RCW 81.48.030; 81.48.040. In re Petition of The National Railroad Passenger Corporation for a temporary increase in speed limits in certain cities, Docket No. TR-971191 (July 1997).

RCW 81.48.040 requires that in considering whether to grant or deny a petition to increase train speeds, the Commission must determine whether the train speeds are "commensurate with the hazards presented and the practical operations of the trains." This test involves a balancing of safety and practical operation of the trains. This balancing test does not require absolute safety, but a determination of whether the train speeds are consistent with both safety and the practical operation of the trains. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Marysville speed limits], Docket No. TR-940309 (June 1995).

The Commission may condition authorization to increase train speed in an area on the installation of specific safety improvements that have been agreed upon by the city and the railroad, when Commission investigation discloses that once the agreed upon measures are taken, the requested speed limits will not create any unreasonable dangerous condition and will be commensurate with the hazards presented and the practical operation of trains. RCW 81.48.040. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Burlington speed limits], Docket No. TR-940249 (April 1995).

The Commission has the exclusive right to set train speeds within the city limits of all cities and towns, except first class cities, and may grant proposed increases in train speed limits within a city if the proposed speeds are commensurate with the hazards presented by the operation of trains and the practical operation of the trains. RCW 81.48.030; 81.48.040.

In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation  
[Edmonds speed limits], Docket No. TR-940288 (April 1995).  
[Ferndale speed limits], Docket No. TR-940308 (April 1995).

While trespassers are a universal problem for railroads, when the amount of trespassing in a particular area is so great as to constitute a local safety hazard not generally found in other areas, the Commission may condition authorization to increase train speed in the area on the installation of specific safety improvements. RCW 81.48.040. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Edmonds speed limits], Docket No. TR-940288 (April 1995).

### **RCW 81.48.040 (cont.)**

The Commission will not condition approval of an increase in train speed limits on the building of a fence when the trespassing danger in the area is not so great as to constitute a local safety hazard not generally found in other areas and the increases sought in the maximum speed limit for trains are commensurate with the hazards presented and the practical operations of the trains. RCW 81.48.030; 81.48.040. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Ferndale speed limits], Docket No. TR-940308 (April 1995).

The Commission has the exclusive right to set train speeds within the city limits of all cities and towns, except first class cities, and may grant proposed increases in train speed limits within a city if the proposed speeds are safe and the operation of the trains will benefit from the speed limit increases. RCW 81.48.030; 81.48.040. In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Mount Vernon speed limits], Docket No. TR-940250 (April 1995).

In considering a petition to increase the speed limits of trains passing through cities and towns, the Commission weighs the benefits of time savings against the increased safety risks. The Commission also considers whether a lower speed limit would reduce or eliminate an essentially local safety hazard. RCW 81.48.040. In re National Railroad Passenger Corp., Docket Nos. TR-2248, TR-2311, TR-2249, TR-2250, TR-2251 (July 1990).

## **CHAPTER 81.53 RCW RAILROAD--CROSSINGS**

### **RCW 81.53.020 Grade separation required where practicable.**

The Commission generally will grant a petition to close a grade crossing unless the public need for the crossing outweighs the hazards that result from the crossing. RCW 81.53.020. Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR-940330 (March 1995).

That allocation of costs for the construction of a grade separated crossing is independently and separately stated in the statutes from practicability indicates to the Commission a legislative determination that the issues are separate and may be considered independently. RCW 81.53.020; 81.53.110. Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088; TR-931089; & TR-931090 (Consolidated) (January 1994).

The Commission generally will not grant a petition to open a grade crossing unless the public need for the crossing outweighs the hazards that would result from opening the crossing. RCW 81.53.020. In re Town of Tonasket v. Burlington Northern Railroad Company, Docket No. TR-921371 (December 1993).

A showing of need for a grade crossing generally should include a showing that existing routes cannot be made adequate at reasonable cost. RCW 81.53.020. In re Town of Tonasket v. Burlington Northern Railroad Company, Docket No. TR-921371 (December 1993).

Proponents of a railway/roadway crossing at grade have an obligation to consider reasonable alternatives to the proposed crossing. RCW 81.53.020. In re Town of Tonasket v. Burlington Northern Railroad Company, Docket No. TR-921371 (December 1993).

## **Chapter 81.53 RCW**

The Commission may separate fiscal issues from practicality issues, and first proceed to determine the latter, when funding has no direct bearing on the other issues, in a proceeding seeking Commission approval to construct a grade separated crossing. RCW 81.53.020; 81.53.060; 81.53.110. In re Spokane County v. Burlington Northern Railroad Company Docket Nos. TR-931088, TR-931089, TR-931090 (December 1993).

### **81.53.030    Petition for crossing--Hearing--Order**

The Commission will dismiss a county's petitions for construction of public crossings when the crossings already exist and they predate the law requiring approval for crossings of railroads by county roads. RCW 81.53.030. Lincoln County v. Burlington Northern Railroad Company, Docket Nos. TR-940851 and TR-940852 (April 1996).

### **RCW 81.53.060    Petition for alteration of crossing--Closure of grade crossing without hearing**

A highway-railway crossing at grade which is poorly configured, poorly protected, has a small holding capacity for vehicles, and is on a railroad main line, should be closed when a safer crossing is readily available, although somewhat less convenient for some persons. RCW 81.53.060. Burlington Northern Railroad Co. v. Skagit County, Washington, Docket No. TR-940282 (December 1996).

That a dangerous crossing at grade allows faster response than another route in the event of fire and other emergency does not require leaving the crossing open when the alternate access is safer and is readily available. RCW 81.53.060. Burlington Northern Railroad Co. v. Skagit County, Washington, Docket No. TR-940282 (December 1996).

A poorly configured, poorly protected, little-used crossing of a narrow gravel road with main line railroad tracks should be closed when a safer crossing is readily available, although somewhat less convenient. RCW 81.53.060. Union Pacific Railroad Company v. Spokane County, Docket No. TR-950177 (July 1996).

Availability of a poorly configured, poorly protected, little-used crossing of a narrow gravel road with main line railroad tracks as an alternative route in the event emergency vehicles block the primary access road is an important consideration, but does not outweigh danger posed by the crossing on a daily basis to persons in motor vehicles using the crossing. RCW 81.53.060. Union Pacific Railroad Company v. Spokane County, Docket No. TR-950177 (July 1996).

The Commission cannot in a closure proceeding order reconfiguration and signalization to a crossing when the record of the proceeding contains insufficient evidence on which to base specific provisions. RCW 81.53.060. Union Pacific Railroad Company v. Spokane County, Docket No. TR-950177 (July 1996).

If a crossing is closed, a petition to reopen the crossing may be considered on a showing of changed circumstances. RCW 81.53.060. Union Pacific Railroad Company v. Spokane County, Docket No. TR-950177 (July 1996).

## Chapter 81.53 RCW

### **RCW 81.53.060 (cont.)**

Because at some point, changing circumstances overtake the findings and conclusions of a conditional order based on the facts and laws at the time the order was entered, the Commission will limit the effect of the order conditionally requiring closure of a grade crossing to three years from the date of its entry. After that period, if the condition is not satisfied, the order will be considered null and void and of no effect. RCW 81.53.060. Union Pacific Railroad Company v. Spokane County, Docket No. TR-950176 (July 1996).

The Commission may accept a stipulated settlement resolving all material issues in a case, when it finds that the result is consistent with the public interest. WAC 480-09-465; RCW 81.53.060. Thurston County v. Burlington Northern Railroad, Cause No. TR-1930 (October 1995).

The Commission may accept a settlement of related petitions for closure of a crossing at grade, for opening a temporary crossing during construction of grade separation, and for allocating costs, when accepting the settlement is in the public interest. RCW 81.53.060; 81.53.130. Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088; TR-931089; TR-931090 (June 1995).

The Commission may separate fiscal issues from practicality issues, and first proceed to determine the latter, when funding has no direct bearing on the other issues, in a proceeding seeking Commission approval to construct a grade separated crossing. RCW 81.53.020; 81.53.060; 81.53.110. In re Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088, TR-931089, TR-931090 (December 1993).

The Commission may order complete redesign and reconstruction of a railroad trestle when the result would be to eliminate or reduce hazards and permit the most effective and safest design for both road and rail traffic at no greater cost than proposed alternatives with obvious drawbacks. RCW 81.53.060. Thurston County v. Burlington Northern Railroad, Cause No. TR-1930 (April 1988).

An allegation that a street intersection has become more dangerous since the closing of a railway crossing does not provide a basis for reopening a hearing on the closure of a railway crossing in which the Commission addressed the anticipated increased traffic at the intersection. RCW 81.53.060; Former WAC 480-08-250. Whatcom County v. Burlington Northern Railroad Company, Docket Nos. TR-1725 and TR-1726 (December 1985).

A petition to reopen a grade crossing will be granted only upon an adequate showing that the public convenience and necessity require another crossing. Where to reopen a grade crossing would require traffic to cross two tracks, and where grade crossings are located within a mile in either direction crossing but a single track, the public convenience and necessity do not require that the crossing be reopened. RCW 81.53.060. Spokane County v. Burlington, Northern, Inc., Docket No. TR-1148 (September 1985).



## **Chapter 81.53 RCW**

### **RCW 81.53.060 (cont.)**

Where there are well-marked alternative crossings nearby, the evidence is sufficient to support closure of a railroad crossing shown to have a restricted view, small holding capacity for cars, and only crossbuck railroad warning signs. RCW 81.53.060. Whatcom County v. Burlington Northern Railroad, Inc., Docket Nos. TR-1725 and TR-1726 (January 1985).

### **RCW 81.53.110 Cost when highway crosses railroad.**

That allocation of costs for the construction of a grade separated crossing is independently and separately stated in the statutes from practicability indicates to the Commission a legislative determination that the issues are separate and may be considered independently. RCW 81.53.020; 81.53.110. Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088; TR-931089; & TR-931090 (Consolidated) (January 1994).

The Commission may separate fiscal issues from practicality issues, and first proceed to determine the latter, when funding has no direct bearing on the other issues, in a proceeding seeking Commission approval to construct a grade separated crossing. RCW 81.53.020; 81.53.060; 81.53.110. In re Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088, TR-931089, TR-931090 (December 1993).

### **RCW 81.53.130 Apportionment of cost.**

The Commission may accept a settlement of related petitions for closure of a crossing at grade, for opening a temporary crossing during construction of grade separation, and for allocating costs, when accepting the settlement is in the public interest. RCW 81.53.060; 81.53.130. Spokane County v. Burlington Northern Railroad Company, Docket Nos. TR-931088; TR-931089; TR-931090 (June 1995).

The Commission may condition closure of a railroad crossing at grade that is requested by the railroad on completion by the railroad of an access road to residences that would make the crossing no longer necessary. RCW 81.53.060. Burlington Northern Railroad Company v. Skagit County, Washington [Boe Street Crossing], Docket No. TR-940282 (May 1995).

The "benefit" standard used in apportioning costs of reconstruction of a railway/highway crossing is not appropriate when an agreement already exists between the parties. RCW 81.53.130. Thurston County v. Burlington Northern Railroad, Cause No. TR-1930 (April 1988).

### **RCW 81.53.261 Crossing signals, warning devices--Petition, motion--Hearing--Order--Costs apportionment--Records not evidence for actions--Appeal.**

Upon petition for a change in existing warning devices at a crossing of a railroad at grade, the Commission will order the change specified in the petition if it determines that the public safety requires such change. RCW 81.53.261. Spokane County v. Burlington Northern Railroad Company, Docket No. TR-931469; Spokane County v. Burlington Northern Railroad Company, Docket No. TR-931516 (January 1994).

## CHAPTER 81.68 RCW

### AUTO TRANSPORTATION COMPANIES

#### **RCW 81.68.010 Definitions.**

Motor transportation is not within interstate commerce if the operations of the ground transportation division of an airline are intrastate in nature, operating almost entirely on an "on-call" basis and providing transportation to anyone who makes a telephone request, without regard to any prior or subsequent airline flight, and selling no "through tickets" and having no common arrangements with connecting out-of-state carriers. RCW 81.68.010(3). WAC 480-30-010. Order M. V. C. No. 1810, In re San Juan Air Services, Inc., d/b/a Shuttle Express, App. No. H-4976 (April 1989).

"Fixed termini" can include service between an airport and unlimited points within a named city or town. RCW 81.68.010(6). Order M. V. C. No. 1810, In re San Juan Air Services, Inc., d/b/a Shuttle Express, App. No. H-4976 (April 1989).

An auto transportation company that funnels its operations into a limited number of major highways to expedite the trip to or from the airport, and uses a number of different city streets to pick up or drop off passengers, uses "regular routes" since the statute allows for departures from the termini or route, whether periodic or regular. RCW 81.68.010(6). Order M. V. C. No. 1810, In re San Juan Air Services, Inc., d/b/a Shuttle Express, App. No. H-4976 (April 1989).

#### **RCW 81.68.020 Compliance with chapter required.**

The Airline Deregulation Act of 1978 does not apply to an airline's ground travel activities operated by a division independent of and separate from the air travel operations. The Act preempts state jurisdiction over air carriers only while they are providing ground transportation services ancillary to and identified with the air carrier's primary service of providing air transportation. RCW 81.68.020. Order M. V. C. No. 1810, In re San Juan Air Services, Inc., d/b/a Shuttle Express, App. No. H-4976, (April 1989).

Filing a tariff that includes rates for territories or commodities outside a carrier's authority does not lawfully expand the filing carrier's certificate authority. The Commission will not recognize a protest to an application for authority that exceeds the protestant's identified authority. RCW 81.68.020; RCW 81.68.030; RCW 81.68.040. Order M. V. C. No. 1444, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (May 1984).

The Bus Regulatory Reform Act does not preempt Washington statutes and regulations that require that a carrier demonstrate a revenue loss and a deterioration of operating ratios prior to the Commission's authorizing a bus route abandonment. Credible evidence that variable costs exceed revenues for affected routes is not presented when the evidence offered uses one system for figuring costs and another system for figuring revenues. RCW 81.68.020; WAC 480-30-120. Order M. V. C. No. 1403, In re Greyhound Bus Lines, Inc., App. No. D-2442 (June 1983) (revised, MC-1515 Sub-No. 342 (1983)).

## Chapter 81.68 RCW

A bus company seeking to abandon bus routes must justify its use of the revenue figures and the time periods chosen for developing those figures, and explain the company's analysis to demonstrate revenue loss and to satisfy the requirements of bus route abandonment laws. RCW 34.04.100(2); RCW 81.68.020; WAC 480-30-120. Order M. V. C. No. 1403, In re Greyhound Bus Lines, Inc., App. No. D-2442 (June, 1983) (revised, MC-1515 Sub-No. 342 (1983)).

### **RCW 81.68.030 Regulation by commission.**

An application for an intrastate certificate based upon Interstate Commerce Commission authority is not subject to protest. The only two issues in such an application are (1) whether the ICC has issued intrastate authority and (2) whether the carrier is conducting substantial actual interstate operations along the route, so as to validate the ICC-granted interstate authority. RCW 81.68.030. Order M.V.C. No. 2120, In re Apple Blossom Lines, Inc., d/b/a Port Angeles-Seattle Bus Lines, Inc., App. No. D-78382 (August 1995).

When the Interstate Commerce Commission has granted intrastate authority in a permit containing no cross-border authority, and the carrier is conducting actual, substantial, regularly scheduled, interstate service on the same route, the Commission may not withhold a certificate for the ICC-authorized intrastate service. RCW 81.68.030. Order M.V.C. No. 2119, In re Apple Blossom Lines, Inc., d/b/a Port Angeles-Seattle Bus Lines, Inc., App. No. D-78382 (August 1995).

The Commission operates within its own statutory authority to implement the portion of the public interest with which it has been charged, and can neither direct another agency in the exercise of its statutory discretion, nor cede its own discretion to another agency. RCW 81.68.030. Order M. V. C. No. 2037, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and Gray Line of Seattle, App. No. D-77199 (February 1994).

It is inappropriate for the Commission to delegate to a third party the authority to determine when its carriers may and may not have rights in a certificate, even for exercise on matters unrelated to the Commission's regulatory interests. RCW 81.68.030. Order M. V. C. No. 2037, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and Gray Line of Seattle, App. No. D-77199 (February 1994).

The Commission may remove a restriction from a permit when there is no public policy reason favoring the restriction. RCW 81.68.030. Order M. V. C. No. 2031, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and Gray Line, App. No. D-77199 (January 1994).

The law is specific in granting to the Commission the power to decide whether a common carrier permit shall continue or end, and the Commission has no apparent statutory authority to delegate it to a governmental or other third entity. RCW 81.68.030. Order M. V. C. No. 2031, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and Gray Line, App. No. D-77199 (January 1994).

**RCW 81.68.030 (cont.)**

Approving a contract to give a prior permit holder the right to control or terminate certificate operations may constitute an unconstitutional delegation of agency discretionary power. RCW 81.68.030. Order M. V. C. No. 2031, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and Gray Line, App. No. D-77199 (January 1994).

The Commission may restrictively amend an auto transportation company's certificate of authority, to prohibit the company from operating in areas where it has willfully and repeatedly violated Commission orders. RCW 80.01.040; RCW 81.04.110; RCW 81.68.030. Order M. V. C. No. 1893, Evergreen Trails, Inc. v. San Juan Airlines, Inc., Docket No. TC-900407 (November 1990).

A certificate to run an expedited service from a military base to the Tacoma Amtrak station, and an expedited service from the Tacoma Amtrak station to the Seattle-Tacoma International Airport, is not designed to authorize the certificate-holder to provide a connecting or through service. The Commission may direct the carrier to take reasonable steps to prevent passengers from purchasing connecting or through tickets. RCW 81.68.030(2); RCW 81.68.040. Order M. V. C. No. 1458, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (September 1984).

Filing a tariff that includes rates for territories or commodities outside a carrier's authority does not lawfully expand the filing carrier's certificate authority. The Commission will not recognize a protest to an application for authority that exceeds the protestant's identified authority. RCW 81.68.020; RCW 81.68.030; RCW 81.68.040. Order M. V. C. No. 1444, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (May 1984).

Airporter service is a direct premium service, and although stops may be made to drop off or pick up airline passengers, there are no scheduled open-door stops. Merely connecting open-door service to an airport does not define airporter service. RCW 81.68.030. Order M. V. C. No. 1444, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (May 1984).

The Commission may restrict advertising that represents bus service as a direct expedited airporter-style transportation when the service requires two changes of buses and multiple stops. RCW 81.68.030(4). Order M. V. C. No. 1412, In re Tacoma Suburban Lines, Inc., App. No. D-2408 (December 1983).

Airporter service is a direct, expedited service; service between a community and a major airport that involves two changes of buses, and multiple stops, is ordinary bus service not substantially similar to airporter service. RCW 81.68.030. Order M. V. C. No. 1412, In re Tacoma Suburban Lines, Inc., App. No. D-2408 (December 1983).

A bus company showing of a disparity between interstate and intrastate rates is not, alone, sufficient to show that requested rate increases are needed and that the resulting fares would be just, reasonable, fair, and sufficient. RCW 81.68.030; WAC 480-30-050. Cause TC-1698, WUTC v. Greyhound Bus Lines, Inc., (June 1983) (revised, MC-1515 Sub-No. 342 (1983)).

## Chapter 81.68 RCW

### **RCW 81.68.040 Certificate of convenience and necessity.**

If an applicant for auto transportation authority within territory already served fails to appear at the hearing on the application, the Commission may dismiss the application if no good cause is shown for the absence. Whether or not a protest is filed, the Commission is required to hold a hearing before it may grant auto transportation authority within territory already served, and is required to find that the public convenience and necessity require an additional carrier. That requires that an applicant come forward and present evidence at hearing in support of the application. RCW 81.68.040; WAC 480-09-700. Order M.V.C. No. 2160, In re Ali, Abdirahman Y., d/b/a Broadway Express, App. No. D-78583 (September 1997).

In transportation applications, the sort of evidence the Commission has found persuasive on the issue of public convenience and necessity is the testimony of witnesses that they have been unable to get service when they needed it from existing carriers. RCW 81.68.040. Order M.V.C. No. 2160, In re Ali, Abdirahman Y., d/b/a Broadway Express, App. No. D-78583 (September 1997).

In a protested proceeding, an applicant for auto transportation authority must present live witnesses to demonstrate that the public convenience and necessity require the service it proposes. The Commission will not consider written statements of witnesses whom the applicant has not made available for cross examination at hearing. RCW 81.68.040. Order M. V. C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198 (January 1996).

Need for new service ordinarily must be established by the testimony of members of the public who require the service. The Commission does not accept self-serving statements of an applicant, and requires that an application be supported by independent witnesses knowledgeable about the traffic. RCW 81.68.040. Order M. V. C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198 (January 1996).

When an applicant proves need for service in a territory that is much smaller than the territory it has applied to serve, the Commission will only grant authority consistent with proof of need. RCW 81.68.040. Order M. V. C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198 (January 1996).

The Commission may grant a certificate to operate an auto transportation company in territory already served by a certificate holder only when the existing carrier or carriers will not provide service to the satisfaction of the Commission. RCW 81.68.040. Order M. V. C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198 (January 1996).

In order legally to conduct intrastate operations as an auto transportation company, a carrier either must have certificate authority issued by the Commission after notice and hearing pursuant to RCW 81.68.040, or must be conducting the intrastate operations on an ICC-authorized interstate route in conjunction with actual substantial interstate service on the route. RCW 81.68.040. Order M. V. C. No. 2130, In re Apple Blossom Lines, Inc., Hearing No. H-5028 (April 1995).

In a proceeding to determine whether a company is engaged in operations without the necessary approval required by Title 81 RCW, the burden rests upon the company of proving that its operations are not subject to the provisions of the title. RCW 81.04.510; 81.68.040. Order M. V. C. No. 2130, In re Apple Blossom Lines, Inc., Hearing No. H-5028 (April 1995).

**RCW 81.68.040 (cont.)**

Convenience, directness and speed are essential characteristics of airporter service. The Commission will give substantial weight to those factors in its satisfactory service determination and in its public convenience and necessity determination in an application of overlapping airporter authority. RCW 81.68.040. Order M. V. C. No. 2057, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia Sea-Tac Airport Express, App. No. D-76533 (June 1994).

Generally, an airporter operation that does not provide direct, expedited, convenient service between a major urban center in its territory and the major airport serving that urban center is not providing service to the satisfaction of the Commission. RCW 81.68.040. Order M. V. C. No. 2057, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia Sea-Tac Airport Express, App. No. D-76533 (June 1994).

Different types of transportation services may require different analyses when the Commission looks at performance to the satisfaction of the Commission and at requirements of the public convenience and necessity, because of differences in market, operation, and other essential characteristics. RCW 81.68.040. Order M. V. C. No. 2057, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia Sea-Tac Airport Express, App. No. D-76533 (June 1994).

RCW 81.68.040's requirements promote the public interest in having regular and dependable passenger transportation services available at fair rates. The restriction on entry is not a barrier behind which poor service, or service that is unresponsive to the changing requirements of the market, is shielded from competition. RCW 81.68.040. Order M. V. C. No. 2041, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia-SeaTac Airport Express, App. No. D-76533 (March 1994).

Recent service improvements made by the existing certificate holder in response to an earlier application for overlapping authority should be considered in a current proceeding for overlapping authority, if made before the current application was filed. RCW 81.68.040. Order M. V. C. No. 2041, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia-SeaTac Airport Express, App. No. D-76533 (March 1994).

An applicant whose existing business operations show it is able to meet its obligations, and whose proposed service would require no additional purchase of equipment or hiring of personnel, has established its financial fitness. RCW 81.68.040. Order M. V. C. No. 2041, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia-SeaTac Airport Express, App. No. D-76533 (March 1994).

A determination of whether an existing permit holder will provide service to the satisfaction of the Commission should not be based on an impression regarding the operating witness's attitude, when that impression is inconsistent with the objective evidence. RCW 81.68.040. Order M. V. C. No. 2041, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia-SeaTac Airport Express, App. No. D-76533 (March 1994).

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### **RCW 81.68.040 (cont.)**

An applicant's assurance of future compliance with Commission rules and laws, combined with objective manifestations of intent to comply, may establish an applicant's fitness, notwithstanding past violations. RCW 81.68.040. Order M. V. C. No. 2041, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia-SeaTac Airport Express, App. No. D-76533 (March 1994).

That a restriction in an airporter bus service's permit is difficult for the public to understand and difficult to enforce does not justify the permit holder's ignoring the restriction; the permit holder's remedy is to remove the restriction through an application for modification of its permit. RCW 81.68.040; WAC 480-30-020. Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc., d/b/a Shuttle Express, Docket No. TC-910789 (March 1993).

Service improvements occurring after the filing of a competing application will not be considered in determining whether an existing auto transportation company's service is satisfactory. RCW 81.68.040. Order M. V. C. No. 1978, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia/Sea-Tac Airporter Express, App. No. D-75018 (September 1992).

The Commission may restrict grants of new auto transportation authority in territory already served when the restriction appears necessary to allow an existing carrier to remain a viable transportation source. RCW 81.68.040. Order M. V. C. No. 1978, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia/Sea-Tac Airporter Express, App. No. D-75018 (September 1992).

The Commission may grant a certificate to operate an auto transportation company in territory already served when the existing certificate holder will not provide service to the satisfaction of the Commission, the applicant has demonstrated its fitness, the public convenience and necessity require the proposed service, and no good cause has been shown to deny the application. RCW 81.68.040. Order M. V. C. No. 1978, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia/Sea-Tac Airporter Express, App. No. D-75018 (September 1992).

When an application is protested, the applicant must establish that the public convenience and necessity require the operations it proposes through the testimony of supporting public witnesses present at the hearing. An application is subject to dismissal if the applicant appears at the hearing and fails to present shipper testimony in support of the application. Order M. V. C. No. 1969, Dardnell R. Fale Jr., d/b/a A C Express Taxi & Airport Transportation, App. No. D-75758 (August 1992).

A certificate to operate an auto transportation company may be granted when the proposed service is required by the public convenience and necessity, no currently-certified carrier provides such service in the territory, and the carrier has made a prima facie showing of fitness and ability to conduct the proposed operations. RCW 81.68.040. Order M. V. C. No. 1953, In re Olympic Van Tours, Inc., App. No. D-75416 (April 1992).

## Chapter 81.68 RCW

### **RCW 81.68.040 (cont.)**

The Commission may grant an application for transfer of bus authority with or without hearing. RCW 81.68.040. Order M. V. C. No. 1935, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways to Reddy Leasing, Inc, d/b/a Bellingham Sea-Tac Airporter, App. No. D-75052 (November 1991).

Operating airporter service while owning only bus authority can support rehearing. It can also support a complaint under RCW 81.04.110; 81.04.200; 81.68.040; WAC 480-09-820. Order M. V. C. No. 1935, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways to Reddy Leasing, Inc, d/b/a Bellingham Sea-Tac Airporter, App. No. D-75052 (November 1991).

The Commission may exclude authority to serve locations presently receiving scheduled airporter service from a grant of on-call, door-to-door airport shuttle service. RCW 81.68.040. Order M. V. C. No. 1909, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2589 (May 1991), modifying Order M. V. C. No. 1899 (March 1991).

An applicant for unrestricted service who demonstrates only a need for service subject to the restrictions in the carrier's existing permit should be granted authority subject to those restrictions. RCW 81.68.040. Order M. V. C. No. 1899, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2589 (March 1991); modified, Order M. V. C. No. 1909 (May 1991).

The Commission's examination of an applicant's financial fitness must be commensurate with the responsibilities of the public service that the firm seeks to provide, the risks to the public of failure, and the firm's financial history. RCW 81.68.040. Order M. V. C. No. 1899, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2589 (March 1991); modified, Order M. V. C. No. 1909 (May 1991).

An applicant for authority whose cost and revenue estimates do not consider the full scope of proposed operations, and whose projections of start-up and operating costs are not balanced by evidence of sufficient finances, fails to demonstrate financial fitness. RCW 81.68.040 (financial fitness). Order M. V. C. No. 1894, In re Marcia Sams, d/b/a Rose's Limousine, Hearing No. D-2590 (December 1990).

To qualify for authority, an applicant must establish that it is willing and able to comply with Commission laws and rules. RCW 81.68.040 (fitness). Order M. V. C. No. 1892, In re Lloyd's Connection, Inc. d/b/a Airport Connection Airporter, Hearing No. D-2556 (December 1990).

A certificate to operate an auto transportation company in territory already served by a certificate holder may be granted only if the existing operator will not serve to the Commission's satisfaction. RCW 81.68.040 (need); WAC 480-30-030. Order M. V. C. No. 1892, In re Lloyd's Connection, Inc. d/b/a Airport Connection Airporter, Hearing No. D-2556 (December 1990).



## Chapter 81.68 RCW

### **RCW 81.68.040 (cont.)**

Public convenience and necessity require the services of an additional carrier if existing carriers cannot meet the needs of supporting witnesses. RCW 81.68.040 (need). Order M. V. C. No. 1892, In re Lloyd's Connection, Inc. d/b/a Airport Connection Airporter, Hearing No. D-2556 (December 1990).

When an order finds that protestant provided satisfactory service to a portion of the territory sought, the Commission will reconsider its final order granting authority to applicant. RCW 81.68.040; WAC 480-09-810. Order M. V. C. No. 1834, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2566 (August 1989).

An applicant seeking transferred authority must show the financial ability to conduct the proposed operations. Anticipated revenues from the acquired authority can be considered, but only to the extent that they are stated with some specificity and certainty and are part of a plan that takes into account the costs of the service. RCW 81.68.040; WAC 480-30-030(6). Order M. V. C. No. 1824, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and E. M. Wickkiser, d/b/a Bellingham Sea-Tac Airporter, App. No. D-2559 (July 1989).

When an applicant has significant, unexplained operating losses, past operations have not been shown to be profitable, and there is no evidence of a plan to correct the carrier's financial situation and no evidence of another source of financial support for the business, the applicant has not made a prima facie showing of financial fitness. RCW 81.68.040. Order M. V. C. No. 1824, In re Evergreen Trails, Inc., d/b/a Evergreen Trailways and E. M. Wickkiser, d/b/a Bellingham Sea-Tac Airporter, App. No. D-2559 (July 1989).

An operating witness must have some knowledge of the company's finances and be able to explain whether the company is making money (or why it is not) in order to establish its financial fitness. RCW 81.68.040. Order M.V.C. No. 1824, In re Evergreen Trails, Inc. d/b/a Evergreen Trailways and E. M. Wickkiser, d/b/a Bellingham Sea-Tac Airporter, App. No. D-2559 (July 1989).

**RCW 81.68.040 (cont).**

In deciding whether territory at issue is "already served" within the meaning of the statute, the Commission will consider the extent of any existing authority, whether existing carriers are serving to the extent of that authority, and whether the type of service provided reasonably serves the market. RCW 81.68.040. Order M. V. C. No. 1809, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2566 (April 1989).

When the evidence shows a prima facie case from applicant--that the intervenors will not serve the territories at issue to the satisfaction of the Commission, and that no good cause has been shown to deny the application--a grant of authority for the territory is consistent with the public convenience and necessity. RCW 81.68.040. Order M. V. C. No. 1809, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2566 (April 1989).

Applicant fitness and financial ability are implicit in the definition of public convenience and necessity, and must be considered for every applicant requesting authority to carry passengers. RCW 81.68.040. Order M. V. C. No. 1809, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2566 (April 1989).

If the Commission authorizes an applicant to provide service outside a protestant's territory, it will not consider evidence submitted by the protestant showing operations outside its certificate authority. RCW 34.04.100; RCW 81.68.040; WAC 480-08-190. Order M. V. C. No. 1495, In re Pacific Northwest Transportation Services, Inc.; Bremerton-Kitsap Airporter, Inc. d/b/a The Sound Connection, Kitsap-Sea-Tac Airporter; Travelines, Inc., App. Nos. D-2468; D-2469; D-2473 (May 1985).

A bus company may not lawfully combine an authorization in its original permit to pick up airline crews from hotels and ticket offices, with an authorization in an after-acquired permit to pick up passengers at an Air Force Base, and combine operations in one vehicle in order to achieve a broad bus service. WAC 480-30-030(1). Cause No. TC-1747 Pacific Northwest Transportation Services, Inc. v. Koco (April 1985).

When a certificate consists of two parts, one of which was purchased, a provision in the purchased authority granting the ability to combine operations in one vehicle under "this permit" applies only to the acquired portion and not to the successor's entire certificate. RCW 81.68.040. Cause No. TC-1747, Pacific Northwest Transportation Services, Inc. v. Koco, (April 1985).

When two carriers are competing for the same routes and stipulate as to evidence of need, the Commission will not consider which carrier initially presented the stipulated evidence. RCW 81.68.040. Order M. V. C. No. 1482, In re Pacific Northwest Transportation Services, Inc., et al., App. Nos. D-2468; D-2469 (February 1985).

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### **RCW 81.68.040 (cont.)**

When two carriers who are competing for the same routes stipulate as to evidence of need, the Commission will not consider which carrier initially presented the stipulated evidence; the Commission will grant authority based on factors bearing upon the public interest. RCW 81.68.040; WAC 480-30-030(7). Order M. V. C. No. 1482, In re Pacific Northwest Transportation Services, Inc. et al., App. Nos. D-2468; D-2469; D-2473 (February 1985).

"Bus" service is different from direct, expedited "Airporter" style service. A protestant's contention that it provides an expedited "Airporter"-style service to an Amtrak station is not supported when the service given is to the protestant's terminal several blocks from the station, and is not offered or advertised as an expedited service. RCW 81.68.040. Order M. V. C. No. 1458, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (September 1984).

A finding of unsatisfactory service by a protestant is supported when the service of the protestant does not meet the definition of the service authorized and the protestant refuses to extend service to the satisfaction of the Commission. RCW 81.68.040. Order M. V. C. No. 1457, In re Richard E. & Helen N. Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (August 1984).

A notice of hearing that includes a citation to RCW 81.68.040 gives adequate notice that overlapping territory makes adequacy of service an issue to be resolved. Order M. V. C. No. 1457, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (August 1984).

A protestant has no right to a separate hearing upon the issue of the adequacy of its service when notice is provided that the service of the protestant is at the heart of the application hearing. RCW 81.68.040. Order M. V. C. No. 1457, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (August 1984).

If an applicant for tour authority seeks to amend its application, expanding the territory sought, the application must be redocketed for protest. RCW 81.68.040. Order M. V. C. No. 1444, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2445 (May 1984).

When there are three competing applications for bus service, the Commission will weigh the various positive and negative components of each application and grant the application that offers the greatest advantage to the public. RCW 81.68.040; WAC 480-08-050(9). Order M. V. C. No. 1444, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

**RCW 81.68.040 (cont.)**

A protest is not valid to the extent it opposes an application for authority that exceeds the protestant's authority. RCW 81.68.040. Order M. V. C. No. 1444, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2445 (May 1984).

Filing a tariff that includes rates for territories or commodities outside a carrier's authority does not lawfully expand the filing carrier's certificate authority. The Commission will not recognize a protest to an application for authority that exceeds the protestant's identified authority. RCW 81.68.020; RCW 81.68.030; RCW 81.68.040. Order M. V. C. No. 1444, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (May 1984).

The testimony of witnesses that provided no more than speculation about a need for a commuter service in territory where a van-pool arrangement already exists could not support a grant of authority. RCW 81.68.040. Order M. V. C. No. 1444, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (May 1984).

An applicant's testimony that he believes service to an unprotested area is needed, without a statement of need from a supporting shipper, will not support a grant of authority. RCW 81.68.040. Order M. V. C. No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

The Commission will not issue a certificate of public convenience and necessity for territory in which an existing carrier is presently serving, unless the existing carrier will not provide service to the satisfaction of the Commission. RCW 81.68.040. Order M. V. C. No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

When the nearest alternative airporter service is 15 miles away, and 15-20 persons a month would use such a service if it were available, the applicant has demonstrated the need for airporter service to the area. RCW 81.68.040. Order M. V. C. No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

The protest to an application that proposes some service and territorial overlap with the protestant, must be supported by more than just an allegation that the application will not be viable if granted because the applicant must draw customers from the same population bases. RCW 81.68.040. Order M. V. C. No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

**RCW 81.68.040 (cont.)**

An application for a route change that would add efficiencies to the carrier, would not give additional

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pick-up service, and would not affect any other carrier, should be granted. RCW 81.68.040. Order M. V. C. No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, App. No. D-2444 (May 1984).

Exceptions taken to a finding of the applicant's financial fitness, which are not supported by evidence that the proposed operation would be financially insecure, will be denied. RCW 81.68.040. Order M. V. C. No. 1443, In re Pacific Northwest Transportation Services, Inc., App. No. D-2444 (May 1984).

In reviewing competing applications for bus authority, the Commission will weigh the various positive and negative aspects of each application and grant the application that will offer the greatest advantages to the public. RCW 81.68.040. Order M. V. C. No. 1443, In re Pacific Northwest Transportation Services, Inc., App. No. D-2444 (May 1984).

An application for authority to operate a proposed tour service, limited to vans containing no more than ten persons, is supported by statements showing an unserved market segment requiring personalized service for small groups. The Commission interprets the term "necessity" to mean "reasonably required by potential customers." RCW 81.68.040. Order M. V. C. No. 1369, In re Emerald City Excursions, Inc., App. No. D-2432 (September 1982).

### **RCW 81.68.090 Scope of chapter.**

The Bus Regulatory Reform Act of 1982 did not mandate federal procedures on the states but rather it allowed for federal review by the ICC for aggrieved carriers. RCW 81.68.090. Cause TC-1698, WUTC v. Greyhound Lines, Inc., (June 1983).

## **CHAPTER 81.70 RCW PASSENGER CHARTER CARRIERS**

### **RCW 81.70.020 Definitions.**

The mere existence of a contract between the applicant and a supporting shipper is not grounds for granting contract carrier authority. Contract carrier authority is distinct from common carrier authority, is subject to separate regulation, and must be specifically applied for with all the requisite public notice.

Former RCW 81.70.020. Order M. V. CH. No. 1034, In re Ameritrek Resources Corporation, App. No. CHA-240 (July 1984).

Travel by airline crews between an airport and temporary quarters is intrastate commerce subject to Commission regulation. RCW 81.70.020; WAC 480-40-030(1). Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (April 1984).

**RCW 81.70.030 Exclusions.**

A for-profit charter bus service that proposes to serve a separate non-profit corporation is not so intertwined with the non-profit corporation that the exemption for non-profit entities applies. RCW 81.70.030(3). Order M. V. CH. No. 1034, In re Ameritrek Resources Corporation, App. No. CHA-240 (July 1984).

Even though a taxi company may potentially be injured economically by a grant of authority, because it is not subject to Commission regulation it has no standing to protest a potential grant of authority. RCW 81.70.030(2); WAC 480-08-040(4). Order M. V. CH. No. 950, In re Brown's Limousine Crew Car. Inc., App. No. CHA-221 (July 1983).

**Former RCW 81.70.040\*\* [required a certificate of public convenience and necessity].**

A prima facie case showing need for service is required before the Commission can grant additional Charter Party authority. The number of supporting witnesses does not determine whether an application will be granted. Former RCW 81.70.040; WAC 480-40-030. Order M. V. CH. No. 1240, In re Gazelle Enterprises, Inc., d/b/a Gazelle Charter Lines, App. No. CHA-264 (August 1987).

An applicant for Charter Party authority must meet the burden of showing need for additional authority. If an applicant fails to make a prima facie case for additional Charter Party authority, it does not matter whether a protestant offers affirmative evidence. Former RCW 81.70.040; WAC 480-40-030. Order M. V. CH. No. 1240, In re Gazelle Enterprises, Inc., d/b/a Gazelle Charter Lines, App. No. CHA-264 (August 1987).

Charter Party authority may be granted only when there is a prima facie showing of need for additional authority. Preference will not support a grant of authority. The fact that a shipper likes the services of an applicant, or must make more than a single call to obtain service, does not demonstrate need for additional Charter Party authority. Former RCW 81.70.040; WAC 480-40-030. Order M. V. CH. No. 1240, In re Gazelle Enterprises, Inc., d/b/a Gazelle Charter Lines, App. No. CHA-264 (August 1987).

The Commission may not grant Commercial Zone authority to an applicant for Charter Party authority because there is no provision for Charter Party Commercial Zone authority. Former RCW 81.70.040; WAC 480-40-030. Order M. V. CH. No. 1240, In re Gazelle Enterprises, Inc., d/b/a Gazelle Charter Lines, App. No. CHA-264 (August 1987).

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\*\*RCW 81.70.040 through 210 were repealed by Laws of 1988, Chapter 30, Section 16.

**Former RCW 81.70.080\* [related to granting or denial of certificates].**

A demonstrated need for additional multi-lingual tour services, which the applicant provides, will

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support a general grant of charter service authority; a grant restricted to multi-lingual services would be impossible to enforce. Former RCW 81.70.080. Order M. V. CH. No. 1079, In re Landmark Travel Service, Inc., App. No. CHA-232 (January 1984).

The testimony by a shipper who needed vehicle capacity for 14 passengers cannot support the application of a carrier whose current equipment has a capacity of only 11. Former RCW 81.70.080. Order M. V. CH. No. 1000, In re Bremerton-Kitsap Airporter, Inc., App. No. CHA-232 (January 1984).

Mere assertions made by a supporting shipper that another charter service is needed are not sufficient to demonstrate need for another carrier. Former RCW 81.70.080. Order M. V. CH. No. 1000, In re Bremerton-Kitsap Airporter, Inc., App. No. CHA-232 (January 1984).

The Commission is not estopped from finding an applicant unfit by reissuance, during the pendency of an extension application, of the carrier's currently-held continuing authority. Under RCW 34.04.101(3) and 34.04.170(2) the Commission could not deny the renewal of the applicant's continuing authority without a show cause proceeding. Former RCW 81.70.080. Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

### **Former RCW 81.70.095\* [related to temporary certificates].**

A carrier that is denied continuing authority by final order, must seek a stay from the court to continue operations under temporary authority that had not expired by its terms. Temporary authority lasts for a specified period of time or until a final order has been entered by the Commission. RCW 81.70.095; RCW 81.70.120; WAC 480-40-030(6)(7)(8). Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

The issuance of temporary authority does not collaterally estop the Commission from finding a carrier unfit for a grant of continuing authority. RCW 81.70.095; WAC 480-40-030(2). Order M. V. CH. No. 995, In re O'Connor Limousine Service, Inc., App. No. CHA-199 (November 1983).

Temporary authority lasts for a specified period of time or until a final order has been entered by the Commission. A carrier denied continuing authority by final order must, to continue operations pending judicial review under temporary authority that had expired by its terms, seek a stay from the court or the Commission. Former RCW 81.70.095; Former RCW 81.70.120; WAC 480-40-030(6),(7),(8). Order M. V. CH. No. 950, In re Brown's Limousine Crew Car, Inc., App. No. CHA-221 (July 1983).

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\*RCW 81.70.040 through 210 were repealed by Laws of 1988, Chapter 30, Section 16.

## CHAPTER 81.77 RCW

### SOLID WASTE COLLECTION COMPANIES

*(Formerly: Garbage and Refuse Collection Companies)*

#### **RCW 81.77.010 Definitions.**

##### **Cross Reference**

< When Motor Freight Authority is Required: See also RCW 81.80.010.

If a shipper's transportation of waste generated by its own environmental management activities is only incidental to those activities, it falls within the private carrier exception of RCW 81.77.010(5). RCW 81.77.010. Order M. V. G. No. 1708, In re West Pac Environmental, Inc., App. No. GA-77281 (May 1994).

The primary focus of Chapter 81.77 RCW is the regulation of the local service of collecting solid waste for disposal; disposal is incidental to the transportation for collection. RCW 81.77.010; 81.77.030; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

The transportation of solid waste for collection or disposal for compensation requires a certificate to operate as a solid waste collection company. RCW 81.77.010. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

A person who arranges the collection of generators' solid waste, having accepted responsibility for doing so in conjunction with another purpose, does not act as a transportation broker. RCW 81.77.010; 81.80.010. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

A firm that controls or manages vehicles engaged in the transportation of solid waste for disposal for compensation is operating as a solid waste collection company and requires authority from the Commission for that activity, even though it attempts to use another carrier to accomplish the physical collection service. RCW 81.77.010; 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

Transportation of contaminated soils for disposal, when such hauling is a substantial part of the carrier's operations, can properly be performed only by a carrier holding solid waste authority. RCW 81.77.010; 81.80.010(4); WAC 480-70-050. Order M. V. No. 144941, In re Rissler Contracting Company, App. No. E-75297 (May 1992).

Materials hauled for disposal are to be hauled by a carrier with solid waste authority. Dump truck commodities that have economic value are properly hauled by a carrier holding dump truck authority. Evidence of need for special handling of contaminated soils in hauling to dump sites does not establish need for dump truck authority. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 144465, In re Roger Dralle d/b/a Rogers Dump Trucking, App. No. P-74586 (January 1992).



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### **RCW 81.77.010 (cont.)**

If recycling will be only an adjunct to solid waste disposal, solid waste authority is appropriate for transportation. The intention of the shipper may determine the proper transportation authority. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

The Commission takes a different perspective on matters involving hazardous and biohazardous wastes, than on matters involving "universal" service. Because of the potential liability for improper transportation or disposal and because the substances are barred from the universal waste stream, the generator may select from among lawful means of transportation, processing or disposal. RCW 81.80.010(4); 81.77.010. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

Regulated transportation for collection is involved when a processor of biohazardous waste conducts the transportation. In that case, its customers are the shippers, and its services must be universally available. RCW 81.77.010; WAC 480-70-050. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

The processor of biohazardous waste may be the shipper if it is not itself conducting the transportation of the waste it processes. Contract carriage may be appropriate for the transportation of the waste depending on the processor's transportation requirements. RCW 81.77.010; WAC 480-70-050. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

A biohazardous waste shipper's reasonable requirements that a carrier perform strictly according to the schedule set by the shipper, be able to deal with bar-coded bins to monitor inventory and location, coordinate the shipper's transportation functions, and act as the shipper's transportation division, are consistent with contract carriage. RCW 81.77.010(4). Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

Another agency's definition of a commodity as waste for its regulatory purposes does not determine whether Title 81 RCW requires solid waste authority or motor carrier authority for its transportation. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

A motor carrier may transport a recyclable commodity when the shipper orders the transportation for recycling rather than for disposal. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

The term "recyclable" for Commission regulation describes a commodity that is transported for recycling, reprocessing, reclamation or for any process that extracts or modifies the commodity for reuse or another commercially valuable purpose. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

**RCW 81.77.010 (cont.)**

Transportation of a commodity may be appropriate for regulation under either solid waste or motor carrier regulation, depending on whether the commodity has commercial value and depending on the destination and end use of the commodity. RCW 81.77.010; 81.80.010(4); WAC 480-70-050. Order M. V. No. 143632, In re C & C Transfer Co., Inc., App. No. E-74249 (July 1991).

A company that provides garbage and refuse collection service to a single customer is not exempt from regulation under chapter 81.77 RCW; there is no de minimis exception to the regulatory scheme. RCW 81.77.010(7). In re Arrow Sanitary Service, Inc., d/b/a Oregon Paper Fiber, Cause No. TG-2197 (December 1989).

A regulated garbage and refuse collection company is one which is primarily in the specialized business of transporting garbage and refuse for collection and/or disposal, for compensation, for all potential customers within a specified area. RCW 81.77.010(7); WAC 480-70-050(7). Cause No. TG-2195, Clark County Disposal, Inc., d/b/a Vancouver Sanitary Service, et al., v. Environmental Waste Systems, Inc., et al. (October 1989).

Whether transportation of garbage or refuse is an "incidental adjunct" to some other private business is properly determined by evaluating the nature of the entire business operation, not by focusing on specific aspects of the business. RCW 81.77.010(5). Cause No. TG-2195, Clark County Disposal, Inc., d/b/a Vancouver Sanitary Service, et al., v. Environmental Waste Systems, Inc., et al. (October 1989).

A carrier transporting garbage or refuse as an incidental adjunct to some other established business, owned and operated by it in good faith, is a private carrier not subject to Commission regulation. RCW 81.77.010(5). Cause No. TG-2195, Clark County Disposal, Inc., d/b/a Vancouver Sanitary Service, et al., v. Environmental Waste Systems, Inc., et al. (October 1989).

The operative distinction between motor carriage authority and garbage collection authority is the purpose of the transportation. If the transportation is for disposal, the material is garbage; if the transportation is to a location for a further or higher use, the transportation is motor carriage. A motor carrier may not lawfully transport garbage except as incident to its motor carrier operation. Chapter 81.77 RCW; RCW 81.80.010(4); WAC 480-70-050(7). Order M. V. No. 133753, In re Sunshine Disposal, Inc., d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986).

A carrier engaged in hauling kiln dust, sometimes for recycle, sometimes for disposal, is engaged "extensively" in refuse operation when the disposal hauling is regular and is of considerable volume. RCW 81.77.010(7); WAC 480-70-050(7). Order M. V. G. No. 1201, In re Fedderly-Marion Freight Lines, Inc., App. No. GA-802 (June 1985).

A carrier with authority to transport "recyclable hazardous waste materials" may haul materials that have no commercial value in their current form but have potential for recycling, and has standing to protest an application for "recyclable...liquid hazardous materials". Chapter 81.77 RCW; WAC 480-12-045(b). Order M. V. No. 130721, In re Crosby & Overton, Inc., App. No. P-66968 (October 1984).

**RCW 81.77.020 Compliance with chapter required--Exemption for cities.**

40 C.F.R. ' 255.33, which states that "major federal facilities" should be treated as though they were

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incorporated municipalities for purposes of Environmental Protection Agency guidelines, merely suggests that the facilities be so treated from a planning standpoint, and does not apply to state regulation of solid waste collection service. RCW 81.77.020. Order M. V. G. No. 1464, In re Basin Disposal, Inc., App. No. GA-898 (January 1991).

Solid waste collection and disposal within a municipality is exempt from Commission regulation only if the municipality undertakes to provide the service itself or to contract for it. RCW 81.77.020. Order M. V. G. No. 1464, In re Basin Disposal, Inc., App. No. GA-898 (January 1991).

The transportation of a commodity that was not shown to have value, to a licensed solid waste disposal facility, is appropriately regulated under solid waste collection law rather than under motor carrier law. RCW 81.77.020; WAC 480-70-050(6). Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990).

In the absence of an affirmative decision by the municipality to contract with a carrier or to provide garbage collection services, the Commission must regulate authority within the territory annexed by the municipality. RCW 35.13.280; RCW 81.77.020. Order M. V. G. No. 1414, In re Superior Refuse Removal Corp., App. No. GA-899 (January 1990).

When a city adopts an ordinance and enters into a franchise agreement with a garbage and refuse collection company, temporary authority issued by the Commission to serve territory annexed by the city is superseded and cancelled as of the effective date of the agreement. RCW 35.13.280; RCW 81.77.020. Order M. V. G. No. 1414, In re Superior Refuse Removal Corp., App. No. GA-899 (January 1990).

Territories served by a garbage and refuse company under contract with a city are exempt from regulation by the Commission. RCW 81.77.020. Order M. V. G. No. 1414, In re Superior Refuse Removal Corp., App. No. GA-899 (January 1990).

RCW 35.13.280 and RCW 35A.14.900 do not suspend solid waste collection authority; they do not provide alternatives to cancellation. The certificate authority is cancelled and the territory then is not served by any WUTC-authorized carrier. RCW 81.77.020. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Prior illegal operations coupled with a statement under oath by the applicant that he will continue to conduct illegal operations demonstrates the applicant's lack of fitness to conduct operations and is a sufficient basis to deny an application for authority. RCW 81.77.020; RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1286, In re Richard D. Clevenger, d/b/a Clevenger Sanitation, App. No. GA-827 (June 1987).

**RCW 81.77.020 (cont.)**

Authority from the Commission is permissive and non-supersessive. A permit issued by the Commission cannot authorize an activity that is otherwise made unlawful by a valid exercise of the police power; but permit restrictions that would allow a city to restrict the materials authorized for transportation would create unnecessary uncertainty between differing jurisdictions and would not enhance the ability of the city to exercise its power. RCW 81.01.040(2); RCW 81.77.020; RCW 81.77.100. Order M. V. No. 133753, In re Sunshine Disposal, Inc., d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986).

The Commission may condition a grant of authority to perform garbage collection service upon the requirement that the applicant obtain necessary permits from municipal authorities. RCW 81.77.020; RCW 81.77.030(4). Order M. V. G. No. 1222, In re Murray E. Fulton, App. No. GA-805 (February 1986).

A garbage carrier may not successfully protest the issuance of temporary authority when it is issued for service to a federal facility under a federal contract. The applicant is exempt from carrier entry requirements under the Constitution. RCW 81.77.020. Order M. V. G. No. 1151, In re Northwest Recovery, Inc., App. No. GA-784 (November 1983).

**RCW 81.77.030 Supervision and regulation by commission.**

**Appellate Decision.** The Commission does not have authority under RCW 81.16.030, under its general statutory powers, or under its general ratemaking authority to examine the financial records of an unregulated company affiliated with a regulated company if there is no contract or arrangement between the affiliated company and the regulated company, regardless of the fact that the ratepayer fees flow to the affiliated company. Waste Management v. WUTC, 123 Wn.2d 621 (1994), reversing WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446, Fourth Supplemental Order (March 1992).

**Appellate decision.** The holder of a certificate to collect garbage within a particular geographical area abandons rights granted under the certificate only if the holder either is unavailable to serve customers or refuses to serve potential customers within that area for a period of 1 year. RCW 81.77.030. Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992), reversing Order M. V. G. NO. 1403 (August 1989).

Commission regulation of the collection and transportation of solid waste is unaffected by the Federal Aviation Administration Authorization Act of 1994, Pub.L. 103-305, 108 Stat. 1570. Those activities remain subject to regulation by the Commission under Chapter 81.77 RCW. Order M. V. No. 148521, In re Lowell Haugen, d/b/a Medical Waste Systems, Inc., Hearing No. H-5024 (April 1995).

The transportation of leachate from a landfill to a wastewater treatment plant is not exempt from Commission regulation under RCW 36.58.050. RCW 36.58.050; 81.77.030. Order M. V. G. No. 1738, In re Sumas Transport, Inc., App. No. GA-77479 (December 1994).

**RCW 81.77.030 (cont.)**

The Commission has sole authority to establish rates for certificated solid waste companies, and no

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statute gives a county authority to set rates, or to require carriers to request specific rates from the Commission. RCW 70.95.090; 70.95.900; 81.77.030. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

While RCW 81.77.030(5) instructs the Commission to require compliance with local solid waste plans, RCW 70.95.090 contains a very specific list of the elements that should be included in such plans, and the Commission is not obligated to enforce elements that are not included in RCW 70.95.090. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

The Legislature has assigned sole authority over solid waste rate design to the Commission. RCW 81.77.030(6). King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

The Commission's cost-of-service methodology for solid waste carriers, the Meeks methodology, does not violate RCW 81.77.030 or 040. Basing rates on cost-of-service studies provides incentives to consumers that further the statutory policy goals. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

The Commission will not allow a solid waste collection company to deviate from the Commission-approved cost-of-service methodology without making a record to justify the deviation. RCW 81.77.030. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

In running a cost-of-service study using company-specific data, those data should be collected under the same categories as in the Commission-approved cost-of-service methodology. RCW 81.77.030. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

The Commission requires certificate holders under Chapter 81.77 RCW to use rate structures consistent with the solid waste management priorities set forth under RCW 70.95.010. RCW 70.95.010; 81.77.030. In re Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal Service and Container Hauling Service, Docket No. TG-931585 (March 1994).

**RCW 81.77.030 (cont.)**

The Commission will apply the law to applications for specialized waste collection and disposal authority, such as biohazardous waste services, consistently with the unique requirements and attributes of that service. The service remains nonetheless subject to the requirements of Chapter 81.77 RCW. Order M. V. G. No. 1633, In re Medical Resource Recycling System, Inc., App. No. GA-76819 (May 1993).

The traditional test for determining whether motor freight transportation of valuable commodities between two points in the same state is intrastate traffic or is a leg in an interstate movement is the shippers' fixed and persisting intent at the time of shipment. RCW 81.77.030. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

The collection of solid waste from in-state generators' premises and its transportation to an in-state storage facility, when the solid waste collection company accumulates the waste for later shipment out of state for the carrier's convenience, is intrastate activity subject to Commission regulation under Chapter 81.77 RCW. RCW 81.77.030; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

The primary focus of Chapter 81.77 RCW is the regulation of the local service of collecting solid waste for disposal; disposal is incidental to the transportation for collection. RCW 81.77.010; 81.77.030; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

Charges for solid waste collection service should reflect costs for providing the service. RCW 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

The Commission will closely scrutinize any attempt to pass on to ratepayers, directly or indirectly, exorbitant and imprudent expert witness costs and attorney fees. RCW 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

Lost revenue from reduced volume of one service is not ordinarily a proper element in rates for another service. RCW 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

The Commission will calculate bad debt expense using historical data when that appears to measure the expense more accurately than an estimate. RCW 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

**RCW 81.77.030 (cont.)**

Partial benefit does not support the full level of expense paid to an affiliated interest. RCW 81.16.030;

## Chapter 81.77 RCW

81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

Rate base may be reduced by booked deferred taxes to avoid ratepayer support of capital that the ratepayers contributed. RCW 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

The Commission must use an appropriate analytical framework, or methodology, for determining the revenue requirements of the companies it regulates. The Lurito-Gallagher method, which rests on the assumption that a firm's capital turnover ratio measures risk and thus indicates the company's required rate of return, is an appropriate available methodology for setting solid waste collection rates. RCW 81.77.030. WUTC v. Sno-King Garbage Company, Inc./Northwest Garbage Co., Inc., Docket Nos. TG-900657 & TG-900658, Fourth/Fifth Supplemental Order (December 1991).

In an application for an overlapping certificate of public convenience and necessity, the quality of the existing solid waste carrier's service to its customers, although not so unsatisfactory as to allow additional authority within its territory, may be referred to the Commission's Enforcement Section for monitoring and appropriate action. RCW 81.77.030. Order M. V. G. No. 1526, In re Superior Refuse Removal Corporation, App. No. GA-849 (November 1991).

42 U.S.C. ' 6961 authorizes the state to regulate garbage collection and disposal on federal installations. RCW 81.77.030. Order M. V. G. No. 1464, In re Basin Disposal, Inc., App. No. GA-898 (January 1991).

An applicant may establish its costs of service and operations by showing its monthly general and administrative expenses, in order to demonstrate whether the applicant has enough money to begin and maintain operations that meet its customers' initial and on-going needs. RCW 81.77.030; WAC 480-70-160 (fitness). Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990).

An applicant requesting authority to collect and dispose of medical waste must show that it has a suitable disposal facility available. RCW 81.77.030; WAC 480-70-160 (fitness); WAC 480-70-540. Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990).

To establish its financial fitness, an applicant may present evidence of its own finances and its parent corporation's finances--so long as the parent corporation is committed to supporting the applicant, if necessary. RCW 81.77.030; WAC 480-70-160. Order M. V. G. No. 1452, In re American Environmental Management Corp., Hearing No. GA-874 (November 1990).

**RCW 81.77.030 (cont.)**

Whether the holder intended to abandon its authority (or a portion thereof) is judged by objective evidence, not by the holder's stated subjective intent. RCW 81.77.030. Order M. V. G. No. 1403, Mason County Garbage Co., v. Harold LeMay Enterprises, Cause No. TG-2163 (August 1989); reversed on other grounds, Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992).

Garbage or refuse authority that has been cancelled by operation of law under RCW 35.13.280 or RCW 35A.14.900 is not available for "restoration" or "reinstatement" to the prior carrier. Cancellation creates unserved territory that may only be reauthorized under chapter 81.77 RCW. RCW 81.77.030; WAC 480-70-210. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Unless a city exercises its right to provide for solid waste utility service within its boundaries, city ordinances affecting elements of garbage or refuse collection service within the Commission's jurisdiction are mere statements of policy and are not mandatory upon carriers. City ordinances cannot supersede state law vesting jurisdiction in the Commission. RCW 80.01.040; RCW 81.77.030. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

The Commission may dismiss an order instituting an investigation of garbage ratemaking methodologies if a general method of determining garbage carrier rates may be inappropriate to the industry. RCW 81.04.110; RCW 81.77.030. Cause TG-1994, In re Use of a Fair Rate of Return and/or Fair Rate of Return or Closely Related Methodology for Garbage and Refuse Collection Service, (October 1986).

**RCW 81.77.040      Certificate of convenience and necessity required--Procedure when applicant requests certificate for existing service area.**

The transferor's fitness ordinarily is not an issue in an application for authorization to transfer a solid waste certificate. RCW 81.77.040. Order M. V. G. No. 1772, In re Buchmann Sanitary Service, Inc./Browning-Ferris Industries of Washington, Inc. App. No. GA-78433; In re The Disposal Group, Inc./Browning-Ferris Industries of Washington, Inc., App. No. GA-78444 (March 1996).



## Chapter 81.77 RCW

### **RCW 81.77.040 (cont.)**

Past operations outside certificate authority are not an absolute bar to a finding of fitness to conduct operations. The Commission will consider whether the violations are repeated or flagrant, whether corrective action was promptly taken, and whether the applicant can now provide credible assurances of future compliance. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

An applicant need not demonstrate profitability of operations as a prerequisite to entry. Rather, it must demonstrate that it has assets sufficient to begin and sustain operations for a reasonable period of time so that profitability can be determined. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

The test for financial feasibility of proposed operations in an application for authority is whether the applicant has the financing to conduct the operations for a reasonable period; whether it has reasonably considered the costs of providing service; and whether those costs appear to be reasonable. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

The Commission recognizes that a generator of biohazardous waste, who may have a continuing liability for any harm caused by that waste, has a heightened responsibility to determine the method of disposal; that its needs for collection and disposal are of a different character from needs for universal waste collection; and that it is in a unique position to evaluate the risks and benefits of collection and disposal services. The Commission gives considerable weight to testimony of specialized service requirements of health care waste generators in determining the public need for a proposed service and satisfaction with existing service. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

The Commission is not regulating disposal when it says that under current law the generator of hazardous and biohazardous wastes may properly have enough of a voice in where, when, and how its biohazardous wastes are disposed of to empower it to receive service from a carrier that has the ability to meet its specialized needs. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

An applicant for statewide authority generally is not required to present testimony of need in every single county of the state. Statewide authority may be granted on a showing of public need throughout the territory, if the result is clear from that showing that authority is needed throughout the territory. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

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### **RCW 81.77.040 (cont.)**

The proper test for public interest is whether the entry of an additional carrier, who has demonstrated public need for its services, will result in damage to existing carriers that causes a reduction to unacceptable levels of available reasonably priced service to consumers. RCW 81.77.040. Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

The Commission's cost-of-service methodology for solid waste carriers, the Meeks methodology, does not violate RCW 81.77.030 or 040. Basing rates on cost-of-service studies provides incentives to consumers that further the statutory policy goals. King County Department of Public Works, Solid Waste Division v. Seattle Disposal Company, Rabanco Ltd., d/b/a Eastside Disposal and Container Hauling, Docket No. TG-940411 (September 1994).

In an application for overlapping general solid waste authority, the Commission determines whether the existing solid waste certificate holder will provide service to its satisfaction by examining service during a reasonable period prior to the application, and generally will not consider evidence of post-application improvements in service under the same owner or under a new owner. RCW 81.77.040. Order M. V. G. No. 1719, In re Brent Gagnon, d/b/a West Waste and Recycling, App. No. GA-76306 (August 1994).

In an application for overlapping general solid waste authority, the Commission may consider evidence relating to a post-application change of ownership of the existing certificate holder as one factor bearing on the public convenience and necessity. RCW 81.77.040. Order M. V. G. No. 1719, In re Brent Gagnon, d/b/a West Waste and Recycling, App. No. GA-76306 (August 1994).

A solid waste collection company is not providing service to the satisfaction of the Commission in a portion of its territory when, with respect to that portion, it makes no provision for service in the event of winter road closures that it knows occur periodically; it is rude, accusatory, slow, and not helpful in responding to customer complaints; it is unreasonably inflexible and unaccommodating in its treatment of the customers; and it is making only a token effort to serve the area. RCW 81.77.040. Order M. V. G. No. 1719, In re Brent Gagnon, d/b/a West Waste and Recycling, App. No. GA-76306 (August 1994).

RCW 81.77.040 requires a hearing on an application to provide solid waste collection service on contract when the territory requested is already served by a certificate holder. RCW 81.77.040. Order M. V. G. No. 1708, In re West Pac Environmental, Inc., App. No. GA-77281 (May 1994).

The Commission may limit a grant of authority to the transportation intended by the shipper and the applicant. RCW 81.77.040. Order M. V. G. No. 1708, In re West Pac Environmental, Inc., App. No. GA-77281 (May 1994).

The Commission evaluates biohazardous waste collection service differently than community universal solid waste collection when looking at performance to the Commission's satisfaction and at requirements of the public convenience and necessity. RCW 81.77.040. Order M. V. G. No. 1707, In re Medical Resource Recycling System, Inc., App. No. GA-76820 (May 1994).

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### **RCW 81.77.040 (cont.)**

In an application for authority to collect and transport biohazardous wastes, the Commission gives considerable weight to generators' perspective on factual matters. As medical professionals, they have unique knowledge about the requirements of the service they need, including the proper retention, transportation, and disposal of the waste. RCW 81.77.040. Order M. V. G. No. 1707, In re Medical Resource Recycling System, Inc., App. No. GA-76820 (May 1994).

The failure of the existing biohazardous waste carriers' retention, transportation, and disposal practices to meet the reasonable environmental requirements of medical professionals is a basis for finding that the existing service fails to meet the satisfaction of the Commission. RCW 81.77.040. Order M. V. G. No. 1707, In re Medical Resource Recycling System, Inc., App. No. GA-76820 (May 1994).

When a search for biohazardous waste service would have been fruitless, because the service the shippers required was unavailable, supporting shippers need not demonstrate that they conducted a search for the service. RCW 81.77.040. Order M. V. G. No. 1707, In re Medical Resource Recycling System, Inc., App. No. GA-76820 (May 1994).

If an existing biohazardous waste carrier has not provided, and has not advertised or otherwise reasonably made known its willingness to provide, the kind of service that generators supporting the application require, there is no reason for the generators to expect that the service might be available. RCW 81.77.040. Order M. V. G. No. 1707, In re Medical Resource Recycling System, Inc., App. No. GA-76820 (May 1994).

Mere desire for a backup carrier in the event of possible discontinuance of, or deterioration in, existing service, or mere preference for competition, does not demonstrate a need for an additional carrier. RCW 81.77.040. Order M. V. G. No. 1674, In re Sureway Medical Services, Inc., App. No. GA-75968 (December 1993).

**RCW 81.77.040 (cont.)**

The Commission will apply provisions of Chapter 81.77 RCW to applications for specialized waste collection and disposal authority consistently with the unique requirements and attributes of the specialized service. RCW 81.77.040. Order M. V. G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993).

In evaluating whether existing specialized biohazardous waste service will be to the Commission's satisfaction, the Commission does not limit its consideration to specific service failures of the sort that usually are significant in neighborhood garbage collection service, such as missed pickups. Its evaluation includes need-related sufficiency of service considerations -- whether the existing service reasonably serves the needs of the specialized market. RCW 81.77.040. Order M. V. G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993).

The issue of need for an additional solid waste carrier to provide specialized collection service involves an evaluation of customers' reasonable need for additional or different service as well as the effect of a grant of competing authority on the viability of existing service. RCW 81.77.040. Order M. V. G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993).

The Commission will not grant an applicant statewide authority when it demonstrates public need for additional specialized service in only a narrow geographical area. RCW 81.77.040. Order M. V. G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993).

Generally, an applicant is not required to demonstrate that its proposed operations are certain to be profitable, only that it can finance the proposed operations for a reasonable period, until they either become profitable or demonstrate that they lack feasibility. RCW 81.77.040. Order M. V. G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993).

The granting of a limited number of certificates to perform solid waste collection service under chapter 81.77 RCW in the form of "regulated monopoly" does not violate or conflict with the anti-monopoly provisions of Article 12, ' 22 of the Washington State Constitution. Constitution; RCW 81.77.040. Order M. V. G. No. 1660, In re Superior Refuse Removal Corporation, App. No. GA-896 (September 1993).

In deciding an application for overlapping solid waste authority, the Commission applies a reasonableness test in determining whether the existing solid waste collection company will provide service to the satisfaction of the Commission. RCW 81.77.040. Order M. V. G. No. 1660, In re Superior Refuse Removal Corporation, App. No. GA-896 (September 1993).

Sentiment in the community as to the necessity for the proposed service is one of several factors listed in RCW 81.77.040 that the Commission considers in making its public convenience and necessity determination. RCW 81.77.040. Order M. V. G. No. 1660, In re Superior Refuse Removal Corporation, App. No. GA-896 (September 1993).

**RCW 81.77.040 (cont.)**

## **Chapter 81.77 RCW**

An application cannot be amended to substitute one applicant for another, when the second applicant is not a successor in interest of the first. The new applicant must file an entirely new, original application. RCW 81.77.040; WAC 480-70-120. Order M. V. G. No. 1646, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (July 1993).

The Commission will grant an application for a certificate of public convenience and necessity to provide solid waste collection service in a territory already served by a certificate holder only if the evidence shows that the existing company will not provide service to the satisfaction of the Commission. RCW 81.77.040. Order M. V. G. No. 1639, In re Superior Refuse Removal Corporation, App. No. GA-896 (June 1993).

In exercising its judgment on whether an existing solid waste carrier will provide service to the Commission's satisfaction, the Commission will consider factors that relate to the overall quality of the existing service, including the nature, the seriousness and the pervasiveness of complaints about service; the carrier's response to customer complaints and its demonstrated ability to resolve them to the Commission's satisfaction; and the carrier's history of compliance with regulation, with special attention to the carrier's cooperativeness on matters central to the Commission's regulation in the public interest. RCW 81.77.040. Order M. V. G. No. 1639, In re Superior Refuse Removal Corporation, App. No. GA-896 (June 1993).

Generally, the Commission will consider whether an applicant for competing solid waste authority demonstrates support throughout the community in favor of the competing service. RCW 81.77.040. Order M. V. G. No. 1639, In re Superior Refuse Removal Corporation, App. No. GA-896 (June 1993).

Whether an applicant for overlapping solid waste authority would provide equal or better service than the existing solid waste collection company is not relevant to the Commission's determination of whether the existing company will provide service to the Commission's satisfaction. RCW 81.77.040. Order M. V. G. No. 1639, In re Superior Refuse Removal Corporation, App. No. GA-896 (June 1993).

The legislature has determined that a monopoly-based system for solid waste collection is consistent with the public interest. RCW 81.77.040. Order M. V. G. No. 1633, In re Medical Resource Recycling System, Inc., App. No. GA-76819 (May 1993).

The Commission will comply with the direction of the Court of Appeals to restore prior authority to a solid waste collection company that has prevailed on appeal from an adverse final Commission order. RCW 34.05.574; 81.77.040. Order M. V. G. No. 1599, Mason County Company v. Harold LeMay Enterprises, Cause No. TG-2163 (January 1993).

Persons who have the lawful authority to do so, other than generators, may be responsible for ordering collection of solid waste. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

### **RCW 81.77.040 (cont.)**

The satisfactory nature of existing carriers' service and the public's need for an additional carrier are

judged as of the time an application is filed. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

The satisfactory nature of service by providers of specialized solid waste collection services is measured according to the technology of disposal, ability to coordinate disposal, the nature of protection afforded collected waste, and protections against potential statutory and civil liability. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

The finding of failure of satisfactory service does not necessarily involve a moral judgment. A carrier may be found unsatisfactory despite providing excellent service to the public within the terms of its certificate if the service does not meet the reasonable requirements of shippers. The carrier's remedy is to be observant about customers' needs and to seek authority that will permit it to meet those needs. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

The Commission will look to the nature of a proposed operation rather than the label applicants apply to it. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

A firm that controls or manages vehicles engaged in the transportation of solid waste for disposal for compensation is operating as a solid waste collection company and requires authority from the Commission for that activity, even though it attempts to use another carrier to accomplish the physical collection service. RCW 81.77.010; 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

A proposed contract carrier service is not required by the public convenience and necessity when its function would further the unlicensed conduct of a regulated activity. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

The issue of need for an additional solid waste carrier to provide specialized collection service involves an evaluation of customers' reasonable need for additional or different service as well as of the consequences of a grant of authority. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

An affiliated interest transaction that could affect the lawful level of rates does not affect contract carrier entry unless it affects the viability of the operation, the identity of responsible control, or some other element bearing on entry. RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

Authority to collect biohazardous waste is a subset of both garbage collection and refuse collection and is not a category of solid waste impermissible under RCW 81.77.040. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

**RCW 81.77.040 (cont.)**

The provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can constitutionally be applied to the collection of solid waste in this state for disposal out of state. RCW 81.77.040; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General

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Ecology Consultants, Docket No. TG-920304 (January 1993).

A change in ownership of an existing solid waste company occurring after the filing of a competing application may not be considered in determining whether the existing carrier's service will be satisfactory. RCW 81.77.040. Order M. V. G. No. 1566, In re Superior Refuse Removal Corporation, App. No. GA-896 (July 1992).

The Commission will approve a transfer of a solid waste certificate if it is consistent with the public interest to do so. RCW 81.77.040; WAC 480-70-110. Order M. V. G. No. 1562, In re Yakima Valley Disposal, Inc./Yakima Waste Systems, Inc., App. No. GA-75821 (July 1992).

New solid waste service should not be authorized in territory where satisfactory service is already being provided. RCW 81.77.040. Order M. V. G. No. 1537, In re Superior Refuse Removal Corporation, App. No. GA-849 (February 1992).

The standard for a grant of overlapping solid waste authority is whether the overall quality of existing service is satisfactory, considering all pertinent facts. RCW 81.77.040. Order M. V. G. No. 1537, In re Superior Refuse Removal Corporation, App. No. GA-849 (February 1992).

An order's finding of need for services relates to facts found in the hearing. On petition for alteration or rehearing filed four years after the hearing, the underlying circumstances found as facts cannot be assumed to remain valid. RCW 81.77.040; WAC 480-09-820. Order M. V. G. No. 1533, In re Sure-Way Incineration, Inc., App. No. GA-868 (February 1992).

The Commission takes a different perspective on matters involving hazardous and biohazardous wastes, than on matters involving "universal" service. Because of the potential liability for improper transportation or disposal and because the substances are barred from the universal waste stream, the generator may select from among lawful means of transportation, processing or disposal. RCW 81.77.010; 81.77.040. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

The Commission must deny an application for a certificate of public convenience and necessity to haul solid waste unless it is shown that the existing carrier in the requested territory will not provide service to its customers to the satisfaction of the Commission. RCW 81.77.040. Order M. V. G. No. 1526, In re Superior Refuse Removal Corporation, App. No. GA-849 (November 1991).

In determining whether to authorize overlapping solid waste authority, the Commission will consider whether the applicant's service history, if any, is substantially better than the existing carrier's service history. RCW 81.77.040. Order M. V. G. No. 1526, In re Superior Refuse Removal Corporation, App. No. GA-849 (November 1991).

### **RCW 81.77.040 (cont.)**

In deciding whether an existing solid waste carrier will provide service to the Commission's satisfaction, the Commission will consider factors that relate to the overall quality of the existing service, including the nature, the seriousness and the pervasiveness of complaints about service; the carrier's response to customer complaints and its demonstrated ability to resolve them to the Commission's satisfaction; and

the carrier's history of compliance with regulation, with special attention to the carrier's cooperativeness on matters central to the Commission's regulation in the public interest. RCW 81.77.040. Order M. V. G. No. 1526, In re Superior Refuse Removal Corporation, App. No. GA-849 (November 1991).

The proper test period for evaluating the quality of existing solid waste service is the period prior to the filing of the application for new authority. The Commission will not ordinarily consider post-application improvements by the existing permit holder. RCW 81.77.040. Order M. V. G. No. 1526, In re Superior Refuse Removal Corporation, App. No. GA-849 (November 1991).

When an application for transfer of a solid waste permit is granted, duplicating authority and authority canceled by operation of law should be deleted to reflect the existence of one unified permit and to avoid problems with improper separate alienation. RCW 35.13.280; 35A.14.900; 81.77.040; WAC 480-70-110. Order M. V. G. No. 1444, In re Rainier Disposal Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-842; Snoking Garbage Co., Inc./R.S.T. Disposal, Inc., d/b/a Tri-Star Disposal, App. No. GA-843 (February 1991).

Existing certificate holders who lack the equipment, personnel, or disposal plan that would enable them to provide needed service that is the subject of an application, will not provide satisfactory service. RCW 81.77.040; WAC 480-09-420(6); WAC 480-70-150(2). Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990). Order M. V. G. No. 1452, In re American Environmental Management Corp., Hearing No. GA-874 (November 1990).

The Commission will allow an amendment to an application at any time, provided the amendment has no adverse affect on interests of persons who are not parties to the proceeding. An amendment that expands the scope of the authority sought must be re-published in the Commission docket. RCW 81.77.040; WAC 480-09-425(5); WAC 480-70-150(1), (2). Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990).

The question of whether the Commission should conduct a comparative analysis of competing applications, arises only if the Commission may consider granting the same or overlapping authority to two or more qualified applicants. RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990). Order M. V. G. No. 1452, In re American Environmental Management Corp., Hearing No. GA-874 (November 1990).

When an applicant specifically limits its request to authority to serve disposal sites in-state, the restrictive language is a limitation on the authority sought. RCW 81.77.040; WAC 480-70-120. Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990).

**RCW 81.77.040 (cont.)**

An applicant who has taken prompt steps to remedy incorrect applications of its tariff, and has demonstrated a willingness to make regulatory compliance a high priority, is not foreclosed from establishing its fitness to provide the proposed service. RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1452, In re American Environmental Management Corp., Hearing No. GA-874 (November 1990).

When a carrier protesting a garbage or refuse application possesses a certificate containing language that



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would authorize service in the territory of the application, and the authority is not shown to have been cancelled, the Commission will consider for purposes of the application proceeding that the protestant possesses the authority. RCW 81.77.040. Order M. V. G. No. 1402, In re R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

When a garbage or refuse carrier is awarded a franchise in annexed territory pursuant to RCW 35.13.280 or RCW 35A.14.900 but fails to provide service pursuant to the franchise, the carrier has waived its rights in the franchise; and when the city ends its solid waste utility, that unserved territory is available for a grant of authority by the Commission. RCW 35.13.280; RCW 35A.14.900; RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

A carrier does not provide service to the satisfaction of the Commission when the carrier demonstrates repeated service failures; repeated and knowing violations of law and rule; repeated failure to correct knowing violations until ordered by the Commission; and failure to present sufficient or complete information as to its ownership and finances. RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

A carrier's rates, as opposed to its cost of service and the feasibility of its operations, are not generally a proper factor in a grant of solid waste collection authority. RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

A proposal for service which offers customers a variety of options tailored to volume needs, and which is shown to be supported by existing rates, is superior to a competitive proposal for service which is less flexible in meeting customers' needs, which is not sufficiently shown to be supported by existing rates and which has limited backup capacity, although the latter proposal may also be reasonable. RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

### **RCW 81.77.040 (cont.)**

When each of two competing applications for authority presents substantial evidence of favorable community sentiment, the Commission may consider in its comparative evaluation the sentiment of persons who have been served by both carriers. RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

A carrier which repeatedly charged rates outside its tariff, which failed to comply with enforcement requests and with its own promises to comply, which failed to provide sufficient information regarding its ownership and financial condition and which filed incomplete annual reports--waiting for a challenge

from the regulator before providing additional information--may be found to have failed to demonstrate its fitness to conduct operations. RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal Cause No. GA-845; In re Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Minority ownership or participation in an applicant for solid waste collection authority is not a factor that the Commission may consider in evaluating competing applications, unless the minority ownership is shown relevant under law or bona fide shipper needs. RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

The Commission may not grant authority in territory already served by an existing carrier unless it finds that the existing carrier will not provide service to the satisfaction of the Commission. RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

In determining whether a carrier will provide service to the Commission's satisfaction, the Commission will review evidence concerning the nature, seriousness and pervasiveness of complaints; the carrier's demonstrated ability to resolve complaints; and its history of compliance with regulation, with attention to the carrier's cooperativeness on matters central to regulation in the public interest. RCW 81.77.040. Order M. V. G. No. 1402, R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Co., d/b/a Rabanco Companies, Cause No. GA-851 (July 1989).

Applicants for garbage and/or refuse collection authority have an affirmative burden to come forward with evidence about the costs of facilities and of providing service and about the economic feasibility of the service. RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1367, In re Northwest Unitech, Inc., App. No. GA-864 (January 1989).

An order finding that motive behind tariff violations is relevant in determining level of service does not imply that such violations are to be excused. RCW 81.77.040. Order M. V. G. No. 1357, In re Superior Refuse Removal Corp., App. No. GA-849 (September 1988).

**RCW 81.77.040 (cont.)**

Although the presence or absence of a self-serving motive such as additional profit may not be considered in determining whether a tariff violation has been committed, motive may be considered in determining whether an existing garbage carrier's level of service is satisfactory pursuant to RCW 81.77.040. Order M. V. G. No. 1335, In re Superior Refuse Removal Corp., App. No. GA-849 (June 1988).

The Commission must deny an application for a certificate of public convenience and necessity to authorize service unless it is shown that the existing carrier in the requested territory has provided service to its customers that, over all, is unsatisfactory to the Commission. RCW 81.77.040. Order M. V. G. No. 1335, In re Superior Refuse Removal Corp., App. No. GA-849 (June 1988).

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In an application for a certificate of public convenience and necessity, the quality of protestant's service to its customers, although not so unsatisfactory as to allow additional authority within its territory, may be referred to the Enforcement Section of the Commission for monitoring and appropriate action. RCW 81.77.040. Order M. V. G. No. 1335, In re Superior Refuse Removal Corp., App. No. GA-849 (June 1988).

In an application for a certificate of public convenience and necessity to authorize refuse collection service in territory where authority already exists, existing service may be deemed satisfactory by the Commission if garbage is collected on schedule and regularly, and if the level of complaint about service is neither large in proportion to the server's customer base nor reflecting of serious or pervasive service problems. RCW 81.77.040. Order M. V. G. No. 1335, In re Superior Refuse Removal Corp., App. No. GA-849 (June 1988).

The Commission may deny an application for a certificate of public convenience and necessity when a grant may lead to higher costs to the existing carrier and an increase in its rates, while the applicant realizes no such problems. "Cream Skimming" is not in the public interest and is contrary to public policy. RCW 81.77.040. Order M. V. G. No. 1335, In re Superior Refuse Removal Corp., App. No. GA-849 (June 1988).

Prior illegal operations coupled with a statement under oath by the applicant that he will continue to conduct illegal operations demonstrates the applicant's lack of fitness to conduct operations and is a sufficient basis to deny an application for authority. RCW 81.77.020; RCW 81.77.040; WAC 480-70-160. Order M. V. G. No. 1286, In re Richard D. Clevenger, d/b/a Clevenger Sanitation, App. No. GA-827 (June 1987).

When an applicant's supporting witnesses testify to similar service problems that are consistent over time, and the testimony represents a significant proportion of the customer base, the evidence supports a conclusion that there is a true failure of service. RCW 81.77.040. Order M. V. G. No. 1264, In re Lawson Disposal, Inc., App. No. GA-824 (January 1987).

**RCW 81.77.040 (cont.)**

When substantial testimonial evidence of consistent service problems supports findings of need for extended garbage service, and there are neither internal inconsistencies in the testimony nor objective information in the record external to the testimony that would cast substantial doubt upon the findings, the findings should be accepted and the application should be granted. RCW 81.77.040. Order M. V. G. No. 1264, In re Lawson Disposal, Inc., App. No. GA-824 (January 1987).

Washington State regulation of a garbage carrier operating in Washington, but based in Oregon, in light of Washington's legitimate health and safety concerns, does not impose an impermissible burden on interstate commerce. RCW 81.77.040; RCW 81.77.100. Cause No. TG-1911 In re Evergreen Waste Systems (May 1986).

Commission regulation of garbage and refuse companies is not an unconstitutional economic protection because the law does not differentiate between in-state and out-of-state economic interests--the statute requires that each obtain a certificate prior to operation--and because it promotes local health and safety interests. Statutes that limit economic activity are not unconstitutional if they further a legitimate health and safety concern and are applied equally to all applicants. RCW 81.77.040. Cause No. TG-1911 In re Evergreen Waste Systems (May 1986).

The fact that a commodity may be physically transported by dump truck is not dispositive of the need for a garbage certificate. Rather, it is the nature of the commodity and its disposition at a disposal site that control. RCW 81.77.040. Order M. V. G. No. 1222, In re Murray E. Fulton, App. No. GA-805 (February 1986).

A garbage collection company that functions completely in the state of Washington, except that it dumps garbage in Oregon, does not avoid Washington state regulation through the negative implications of the Commerce Clause of the United States Constitution. The regulation of garbage collection within a state is a legitimate state interest. RCW 81.77.040; RCW 81.77.100. Cause TG-1859 In re All County Disposal Services, Inc., (August 1985).

A company engaged in the collection and disposal of garbage must obtain a certificate of convenience and necessity before commencing operations in the state of Washington. RCW 81.77.040. Cause TG-1859 In re All County Disposal Services, Inc., (August 1985).

When an applicant's testimony that he did not know that authority was needed when operating for three years was found credible by the presiding officer, and there is no evidence in the record to indicate otherwise, the proposed finding of good faith operations will not be disturbed. RCW 81.77.040; WAC 480-08-240(13). Order M. V. G. No. 1183, In re Amalgamated Services, Inc., App. No. GA-767 (November 1984).

Activity is not a factor or element in determining whether the transfer of a garbage certificate will be consistent with the public interest. RCW 81.77.040; WAC 480-70-110. Order M. V. G. No. 1185, In re Snoking Garbage Co., Inc./ R.S.T. Disposal Co., Inc., App. No. GA-788 (November 1984).

**RCW 81.77.040 (cont.)**

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Rates are not a proper element for determining whether garbage authority should be transferred. RCW 81.77.040. Order M. V. G. No. 1185 In re Snoking Garbage Co./R.S.T. Disposal Service, Inc., App. No. GA-788 (November 1984).

An applicant with an operation requiring specialized equipment and trained personnel, conducting extensive operations for three years in good faith but without authority, may demonstrate need based on those operations. RCW 81.77.040. Order M. V. G. No. 1183, In re Amalgamated Services, Inc., App. No. GA-767 (October 1984).

Testimony of a protesting witness concerning circumstances that existed in an area before the protestant's authority was expanded is not enough to overcome a demonstration of need based on both current and historical evidence. RCW 81.77.040. Order M. V. G. No. 1176, In re William R. Bell d/b/a Montleon Trucking, App. No. GA-788 (July 1984).

On the threshold satisfactory service issue in an application for overlapping authority, the Commission will not consider evidence of service improvements made by the existing certificate holder after the application for competing authority was filed. Order M. V. G. No. 795, In re Anthony DiTommaso d/b/a DiTommaso Bros. Garbage Service, App. No. GA-508 (November 1975); Order M. V. G. No. 726, In re Anthony J. DiTommaso, App. No. GA-449 (February 1975).

### **RCW 81.77.070 Public service company law invoked.**

"Cream skimming," selective service to the most lucrative accounts and avoidance of less lucrative or more expensive accounts to serve, is forbidden to regulated solid waste carriers. RCW 81.28.010; 81.77.070. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

### **RCW 81.77.100 Scope of chapter with respect to foreign or interstate commerce--Regulation of solid waste collection companies.**

The collection of solid waste from in-state generators' premises and its transportation to an in-state storage facility, when the solid waste collection company accumulates the waste for later shipment out of state for the carrier's convenience, is intrastate activity subject to Commission regulation under Chapter 81.77 RCW. RCW 81.77.030; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

The collection of solid waste is a local function of singularly local concern. RCW 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

The primary focus of Chapter 81.77 RCW is the regulation of the local service of collecting solid waste for disposal; disposal is incidental to the transportation for collection. RCW 81.77.010; 81.77.030; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

**RCW 81.77.100 (cont.)**

The purpose of Chapter 81.77 RCW is to protect public health and safety and to ensure that solid waste collection services are provided to all areas of the state where incorporated cities have not acted to regulate collection. RCW 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

The provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can constitutionally be applied to the collection of solid waste in this state for disposal out of state. RCW 81.77.040; 81.77.100. In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (January 1993).

A company conducting business as a garbage and refuse collection company in the state of Washington is subject to regulation under chapter 81.77 RCW, notwithstanding any other operations it may conduct as a registered interstate motor carrier. RCW 81.77.100. In re Arrow Sanitary Service, Inc., d/b/a Oregon Paper Fiber, Cause No. TG-2197 (December 1989).

The Commission may determine whether solid waste transportation statutes may be constitutionally applied to a Oregon company doing business in Washington. Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974), does not prevent the Commission from determining the constitutionality of its statutes as they are applied in particular instances. RCW 81.01.040; RCW 81.77.100. Cause No. TG-1911 In re Evergreen Waste Systems (May 1986).

Washington State regulation of a garbage carrier operating in Washington, but based in Oregon, in light of Washington's legitimate health and safety concerns, does not impose an impermissible burden on interstate commerce. RCW 81.77.040; RCW 81.77.100. Cause No. TG-1911 In re Evergreen Waste Systems (May 1986).

**RCW 81.77.110 Temporary certificates.**

**Cross References**

< Temporary Certificates: See also WAC 480-70-130.

The Commission will deny an application for temporary solid waste authority when it finds, after investigation, that existing solid waste collection companies can supply the necessary service and that there is no immediate and urgent need for the requested services. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1721, In re Stericycle of Washington, Inc., App. No. GA-78077 (August 1994).

In granting temporary authority to preserve the status quo by allowing service under prior temporary authority to continue, the Commission will not grant the applicant authority to serve shippers whom it served in the past but who now are receiving service from other carriers and do not need or desire service from the applicant. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1700, In re Stericycle of Washington, Inc., App. No. GA-77745 (April 1994).

**RCW 81.77.110 (cont.)**

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Generally, the Commission will not grant temporary solid waste authority when the certificated carrier already serving the territory is ready, willing, and able to provide the proposed service. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1624, In re Brent Gagnon, d/b/a West Waste & Recycling, App. No. GA-76793 (May 1993).

A solid waste collection company operating under temporary authority is an "existing carrier" for purposes of the determination of an application for overlapping temporary solid waste authority. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1633, In re Medical Resource Recycling System, Inc., App. No. GA-76819 (May 1993).

Ordinarily, the evaluation of factual issues beyond sufficiency of a temporary application and its support is better left to a hearing on the continuing or permanent solid waste authority, rather than decided in an application for temporary authority. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1633, In re Medical Resource Recycling System, Inc., App. No. GA-76819 (May 1993).

Shipper statements that merely express general support for a grant of temporary solid waste authority without identifying any service problem or any specific information from which the Commission could conclude that a grant of temporary authority is in the public interest, provide no support for an application for temporary authority. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1633, In re Medical Resource Recycling System, Inc., App. No. GA-76819 (May 1993).

WAC 480-09-500 gives the Commission discretion to use brief adjudications to resolve issues involving temporary applications. The decision to hold a brief adjudication and the decision to grant or deny temporary authority are both discretionary acts. RCW 81.77.110 WAC 480-09-500; 480-70-130. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

An order on temporary authority is not res adjudicata for facts or issues in a parallel full proceeding, because of the different standards for a grant and the limited argument and record on which temporary authority must be granted. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

The Commission's principal concern in deciding whether to grant temporary authority is need for service; if it appears reasonably probable that unmet need for service exists, and if other indicators are generally favorable to a grant, the Commission will grant authority. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

A reasonable need that is imminent and is required prior to the time a contested application for permanent authority can be granted is an "immediate need." RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

### **RCW 81.77.110 (cont.)**

The nature and extent of services that solid waste collection companies provide with existing temporary authority, will determine whether the Commission will grant additional temporary authority. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1445, In re Enoch Rowland and Milton Bloch, d/b/a

Kleenwell Biohazard Waste and General Ecology Consultants, App. No. GA-906 (October 1990).

A temporary solid waste collection certificate may be issued only if it is in the public interest. A determination of the public interest is made by evaluating several factors, including whether there is an urgent need for the service and whether service is currently available. RCW 81.77.110. Order M. V. G. No. 1418, In re Therm-Tec Destruction Service, d/b/a TDS of Oregon, App. No. GA-904 (February 1990).

A grant of overlapping temporary authority must be based on a finding that the protestants cannot or will not serve to the satisfaction of the Commission. An argument by the applicant that its service is superior is generally insufficient to lead to a conclusion that the existing service is unsatisfactory. RCW 81.77.110. Order M. V. G. No. 1418, In re Therm-Tec Destruction Service, d/b/a TDS of Oregon, App. No. GA-904 (February 1990).

Temporary authority for garbage collection service may be granted even though there may be overlaps between existing and temporary authorities if there is a public need for service and a lack of specificity in competing applications and in protests as to territory of service. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1280, In re R. S. T. Disposal Co., Inc. d/b/a Tri-Star Disposal, App. No. GA-844 (April 1987).

A challenge made to the fitness of an applicant for temporary authority, based upon the applicant's failure to obtain authority earlier, raises an issue properly resolved at a hearing on the application for continuing authority. When the good faith of the applicant has been demonstrated prima facie in a temporary authority application, temporary authority may be granted. RCW 81.77.110; WAC 480-70-130. Order M. V. G. No. 1144, In re Amalgamated Services, Inc., App. No. GA-774 (April 1983).

When protestants do not have the authority to operate in the entire area of a temporary grant, and when the requirements of shippers include specialized equipment and trained personnel that protestants are not authorized to provide, there is no clear showing that the existing carriers have the present capability to serve the shippers' needs and the issues are properly resolved at a full hearing for continuing authority. RCW 81.77.110; WAC 480-70-130(1). Order M. V. G. No. 1144, In re Amalgamated Services, Inc., App. No. GA-774 (April 1983).

#### **RCW 81.77.160 Pass-through rates--Rules.**

**Appellate decision.** RCW 81.77.160 unambiguously requires the Commission to allow a solid waste collection company to include in its permanent rates fees or charges for disposal at a facility that the public service company is required to use under a local comprehensive solid waste management plan or ordinance. The statute provides for permanent, not temporary, pass-through of these costs. However, when a company files a tariff to include these costs in its permanent rates, the Commission needs to



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examine the costs to determine whether they fall under the specific provisions of RCW 81.77.160(1) or (2), and during the examination period the rates will go into effect on an interim basis, if the company so requests. Once the Commission is satisfied that the charges do fall under RCW 81.77.160, it must include them in the company's rates. RCW 81.77.160. Waste Management v. WUTC, 123 Wn.2d 621 (1994), reversing WUTC v. Waste Management of Seattle, Inc., Docket No. TG-910446, Fourth Supplemental Order (March 1992).

**Appellate decision.** Regardless of their mandatory nature, the pass-through provisions of RCW 81.77.160 do not preclude review under RCW 81.16.030, referring to transactions between affiliated interests. When the charges under RCW 81.77.160 also fall under RCW 81.16.030, the Commission may conduct a substantive review for the reasonableness of these charges. However, when there is no contract or arrangement between affiliated companies within the meaning of RCW 81.16.030, the Commission has no authority to examine the financial records of the company that is affiliated with the solid waste collection company, regardless of the fact that the ratepayer fees flow to the affiliated company. Waste Management v. WUTC, 123 Wn.2d 621 (1994)

In a rate case involving recycling costs related to an approved county comprehensive solid waste management plan, the Commission expects the solid waste collection company to verify and support any contention that payments to recyclers are preferable financially to the sale of recyclables; that affiliated interest transactions exist and are cost-supported; and that transactions with a charitable entity do not involve a charitable contribution funded by the regulated entity's ratepayers. RCW 81.77.160. WUTC v. Rubatino Refuse, Inc., G-58, Docket No. TG-900635 (May 1991).

The Commission does not agree that all ratepayers should pay for the remediation of an environmental problem that may have been created by a few customers of a landfill. The Commission expects the landfill company and the solid waste collection companies to vigorously pursue actions to recover the costs of remediation, and it expects the solid waste collection companies to file tariffs that are commensurate with any resulting reductions in the disposal fee. RCW 81.77.160; WAC 480-70-240. WUTC v. Twin City Sanitary Service, Cause No. TG-2325; WUTC v. Buchmann Sanitary Service, Inc., Cause No. TG-2326; WUTC v. Vancouver Sanitary Service, Cause No. TG-2327; Third Supplemental Order (July 1990).

## **CHAPTER 81.80 RCW**

### **MOTOR FREIGHT CARRIERS**

#### **RCW 81.80.010 Definitions.**

##### **Cross References**

- < Brokers: See also WAC 480-12-100; RCW 81.80.070.
- < Contract Carriers, Differences from Common: See also RCW 81.80.070.
- < When Solid Waste Authority is Required: See also RCW 81.77.010.

A good faith buy/sell arrangement in which a firm buys raw materials for later resale to an established clientele, where the evidence indicates that the arrangement is not merely a scheme to cloak common carrier operations and evade Commission regulation, is private carriage not subject to Commission regulation. RCW 81.80.010. Order M. V. No. 146106, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-75654 (February 1993).

An operation which holds itself out to the public as a mover of household goods over the state's highways for compensation, and which conducts such transportation in leased vehicles or by operating in tandem with a related entity that provides the vehicles, is a common carrier subject to Commission regulation. RCW 81.80.010(4); 81.80.070. Order M. V. No. 145969, In re Affordable Rental Movers, Inc. and Affordable Truck Rental, Inc., Hearing No. H-5009 (January 1993).

In determining whether a person is providing services that require Commission permit authority, it is irrelevant whether the person owns, leases, rents, or borrows the vehicles it uses in transporting the goods of others. RCW 81.80.010(4); 81.80.070. Order M. V. No. 145969, In re Affordable Rental Movers, Inc. and Affordable Truck Rental, Inc., Hearing No. H-5009 (January 1993).

A person who arranges the collection of generators' solid waste, having accepted responsibility for doing so in conjunction with another purpose, does not act as a transportation broker. RCW 81.77.010; 81.80.010. Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993).

Transportation of contaminated soils for disposal, when such hauling is a substantial part of the carrier's operations, can properly be performed only by a carrier holding solid waste authority. RCW 81.77.010; 81.80.010(4). Order M. V. No. 144941, In re Rissler Contracting Company, App. E-75297 (May 1992).

An operation that advertises itself to the general public to transport property for compensation over the highways of the state of Washington, provides the equipment for conducting such operation, hires and controls personnel who conduct such transportation, does conduct such transportation, and collects money for providing that transportation, is a common carrier. RCW 81.04.010; 81.80.010. Order M. V. No. 144905, In re Michael P. Shanks, a/k/a Mike The Mover, Hearing No. H-5006 (April 1992).

#### **RCW 81.80.010 (cont.)**

## **Chapter 81.80 RCW**

The Commission will consider the totality of an operation in determining its nature, rather than labels applied to its parts, or the structure of the operations. The Commission will not permit subterfuges or unlawful arrangements to cloud the true nature of operations or to control regulatory treatment. RCW 81.04.010; 81.80.010. Order M. V. No. 144905, In re Michael P. Shanks, a/k/a Mike The Mover, Hearing No. H-5006 (April 1992).

Transportation-related services that do not constitute common carriage or brokerage may not require Commission approval. RCW 81.80.010. Order M. V. No. 144656, In re Nippon Express U.S.A., Inc. (NITTU), App. No. P-74686 (March 1992).

Materials hauled for disposal are to be hauled by a carrier with solid waste authority. Dump truck commodities that have economic value are properly hauled by a carrier holding dump truck authority. Evidence of need for special handling of contaminated soils in hauling to dump sites does not establish need for dump truck authority. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 144465, In re Roger Dralle d/b/a Rogers Dump Trucking, App. No. P-74586 (January 1992).

If recycling will be only an adjunct to solid waste disposal, solid waste authority is appropriate for transportation. The intention of the shipper may determine the proper transportation authority. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992).

The term "recyclable" for Commission regulation describes a commodity that is transported for recycling, reprocessing, reclamation or for any process that extracts or modifies the commodity for reuse or another commercially valuable purpose. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

Most recyclable materials are waste products of an initial cycle or use. Describing a commodity as waste does not determine whether Title 81 RCW requires solid waste authority or motor carrier authority for its transportation. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

Another agency's definition of a commodity as waste for its regulatory purposes does not determine whether Title 81 RCW requires solid waste authority or motor carrier authority for its transportation. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

A motor carrier may transport a recyclable commodity when the shipper orders the transportation for recycling rather than for disposal. RCW 81.80.010(4); 81.77.010; WAC 480-70-050. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

### **RCW 81.80.010 (cont.)**

Transportation of recyclable commodities from points in Washington to another point in Washington,

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where they are processed and mixed with other processed substances to make a new commodity called a kiln fuel, is intrastate transportation. This is true although the shipper intends at the time of the initial shipment that the processed commodity will be shipped out of the state. RCW 81.80.010(4); 81.80.130. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

Transportation of a commodity may be appropriate for regulation under either solid waste or motor carrier regulation, depending on whether the commodity has commercial value and depending on the destination and end use of the commodity. RCW 81.77.010; 81.80.010(4); WAC 480-70-050. Order M. V. No. 143632, In re C & C Transfer Co., Inc., App. No. E-74249 (July 1991).

An application for common carrier authority to serve only the facilities of six named shippers, is contrary to the nature of common carriage. RCW 81.80.010(4). Order M. V. No. 142179, In re Edward & Tina Stoeck d/b/a/ CPC, Hearing No. P-73341 (November 1990).

Use of specialized equipment is not a prerequisite for contract carrier authority. RCW 81.80.010(5); RCW 81.80.070 (contract carriers). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

The principal function of a broker is to make purchases of transportation, and a purpose of brokerage regulation is to assure that there are no improper preferences. RCW 81.80.010(12). Order M. V. No. 135329, In re Better Home Deliveries, Inc., App. No. P-69864 (February 1987).

When an applicant seeking a permit as a common carrier broker conducts services that include physical handling and staging of the traffic, physical tender to the carriers, direct oversight of performance of the carriers including responses to complaints, and the handling of all carrier financial and bookkeeping arrangements, such services go far beyond common carrier brokerage services and may not be authorized as such. RCW 81.80.010(12); WAC 480-12-255(9). Order M. V. No. 135329, In re Better Home Deliveries, Inc., App. No. P-69864 (February 1987).

The operative distinction between motor carriage authority and garbage collection authority is the purpose of the transportation. If the transportation is for disposal of a commodity, the material is garbage; if the transportation is to a location for a further or higher use, the transportation is motor carriage. A motor carrier may not lawfully transport garbage except as incident to its motor carrier operation. RCW 81.80.010(4); RCW 81.77.010(7); WAC 480-70-050(7). Order M. V. No. 133753, In re Sunshine Disposal, Inc., d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986).

An enterprise that contracts or arranges for transportation from two or more carriers, that solicits business, dispatches vehicles, and bills and collects in the enterprise's own name, is operating as a broker, whether it collects its fee from the shippers or the carriers. Collecting fees from the carriers does not render the service immune from regulation. RCW 81.80.010(12); WAC 480-12-100(2). Cause TV-1776, Northwest Potato Trucking Division, Inc. (April 1985).

An enterprise which handles billing and collecting, keeps records, and maintains a message center, and which provides money advances and vehicle repair services--and no more--is not acting as a common carrier broker. RCW 81.80.010(12); WAC 480-12-100(2). Cause TV-1776, Northwest Potato Trucking Division, Inc. (April 1985).

## **Chapter 81.80 RCW**

If environmental cleaning is the primary service offered, then the transportation of cleaned material incidental to cleaning is proprietary and is exempt from Commission regulation. RCW 81.80.010(6). Order M. V. No. 130721, In re Crosby & Overton, Inc., App. No. P-66968 (October 1984).

A broker is a person who represents shippers, arranging for the transportation of their goods for a fee paid by the shippers. RCW 81.80.010(12); WAC 480-12-100(2). Order M. V. No. 129662, In re Joyce Mazza & Hazel Gerber, d/b/a Action Brokerage, App. No. P-67597 (May 1984).

### **RCW 81.80.020 Declaration of policy.**

#### **Cross References**

< See also RCW 81.80.070 (contract carriers: public interest).

An order need not find that proposed service would unreasonably congest the highways or tend to impair the stability and dependability of existing service if it does not base denial upon those elements. RCW 81.80.070; 81.80.020. Order M. V. No. 146279, In re Gayle G. Reed, d/b/a Gayle Reed Trucking, App. No. P-76302 (March 1993).

In regulating in the public interest, the Commission is required to balance various transportation policies, and may properly consider the contemporary regulatory environment in balancing those policies. RCW 81.80.020. Order M. V. No. 145831, In re Puregro Company, d/b/a Northwest Trucking, App. No. P-76229 (December 1992).

Among the state transportation policies that are to be promoted through the regulation of transportation is the preservation of common carriage as the best means of promoting universal service. RCW 81.80.020. Order M. V. No. 143447, In re Robert B. Lewis, d/b/a Lewis Distributing, App. No. P-74079 (July 1991).

Termination of temporary authority, at the conclusion of the adjudication of a related application for continuing authority, is not a deprivation of a right. RCW 81.80.020; RCW 81.80.170; WAC 480-12-033. Order M. V. No. 141271, In re Becker Trucking, Inc. d/b/a Becker Trucking; Becker Express, App. No. 19787 (April 1990).

Unneeded authorities have a detrimental effect on the regulated environment and temporary authorities should be cancelled as soon as possible after the application for permanent authority is denied. RCW 81.80.020; RCW 81.80.170. Order M. V. No. 140505, In re Jobbers Freight Service, Inc., App. No. P-70386 (December 1989).

There is a statutory policy that common carriage be preserved for the broadest possible provision of service to the public. RCW 81.80.020. Order M. V. No. 139493, In re Jim Elsbree, d/b/a J & P Trucking, App. No. P-71880 (May 1989).

**RCW 81.80.020 (cont.)**

The anti-preference provision of RCW 81.80.020 relates to preferences by carriers and is not proper authority for the principle that mere shipper preference will not support an application for common carrier authority. Order M. V. No. 136729, In re Raymond O. Daniel, d/b/a P D Xpress, App. No. P-70454 (October 1987).

Although the specialized nature of a proposed service is not a criterion for definition as contract carriage, it is the state's public policy to reserve contract carriage for situations for which it is especially suited or in which common carriage is not able to provide required service. RCW 81.80.010; RCW 81.80.020. Order M. V. No. 135361, In re Blackburn Truck Lines, Inc., App. No. E-19304 (February 1987).

The Commission governs public transportation, not other businesses. Advantages of a grant of carrier authority to another business of applicant is irrelevant to need for common carrier authority. RCW 81.80.020; RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 134938, In re Inland Empire Distribution Systems, Inc., App. No. P-69280 (October 1986).

When a showing is made that a contract carrier applicant offers specialized services to meet the needs of a specific shipper, the state's policy of preserving common carriage is not offended and a grant of contract carrier authority is consistent with the public interest. RCW 81.80.020; RCW 81.80.070. Order M. V. No. 133953, In re Burnham Services Company, Inc., App. No. P-69575 (May 1986).

**RCW 81.80.040 Exempt vehicles.**

When transportation of repossessed vehicles from the point of repossession to storage is conducted in conjunction with authority to accept cash in lieu of repossession, conduct of involuntary as well as voluntary repossession, responsibility for inventory of personal property contained in repossessed vehicles, and responsibility for security of all personal property including the vehicle pending further transportation, the transportation is exempt from Commission regulation under RCW 81.80.040(6). Order M. V. No. 14623, In re Washington State Recovery Service, Inc., App. No. P-75864 (March 1993).

The Commission will grant commercial zone authority to any applicant who exercised qualifying permit authority between two points within a commercial zone. The Commission disregards a 60-day limitation in the rule in order to make the provision consistent with the statute. RCW 81.80.040; WAC 480-12-031. Order M. V. No. 133078, In re Merry Moving & Storage Co./Fleetfoot Max, Inc. d/b/a Fleetfoot Messenger Service, App. No. P-68499 (February 1986).

**RCW 81.80.045 Exemption--Freight consolidators.**

A shipper or association of shippers may be exempt from regulation when it consolidates or forwards shipments using common carriage. A registered exempt shipping association may not tender shipments to, and the Commission may not authorize shipments via, a contract carrier. RCW 81.80.045; WAC 480-12-100. Order M. V. No. 133474, In re James R. Tolin d/b/a Punctual Transportation, App. No. P-68274 (February 1986).

**RCW 81.80.050 Compliance required.**

**Cross References**

## Chapter 81.80 RCW

< See also RCW 81.80.070 (entry common carriers/contract carriers: fitness).

< See also RCW 81.80.280 -- Cancellation of permits.

< See also WAC 480-12-050 (transferee's fitness, ...).

**Appellate decision.** A willful violation of Commission law and rules affords an adequate basis for a finding of unfitness. RCW 81.80.050; 81.80.070 (entry common carriers: fitness-unauthorized operations). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

The Commission will order a household goods mover who is conducting operations without authority from the Commission to cease and desist from conducting activities requiring authority without first having obtained such authority. In re Jason Smith d/b/a Jay the Mover, Hearing No. H-5032 (April 1997).

The requirements of equitable estoppel are not met solely by facts that indicate that a person operated a carrier for 19 years without Commission authorization or interference. Estoppel; RCW 81.80.050; WAC 480-12-050(4)(a). Order M. V. No. 128063, In re Paul & Randal Savage/Golden Grain Trucking Co., App. No. P-66336 (August 1983).

### **RCW 81.80.060 Combination of services.**

A combination of services, including delivery and installation of machinery and instruction of shippers' customers in proper use of the equipment, is appropriate for combination of services contract carriage authority. RCW 81.80.060. Order M. V. No. 139129, In re Gary R. Brister, d/b/a G & G Transfer App. No. E-19657 (February 1989).

When a supporting shipper requires the applicant's common carrier service only when it is combined with other services, the Commission may limit the grant of authority to a combination of services, pursuant to RCW 81.80.060. Order M. V. No. 136956, In re Jess M., Mike J., Jeff L. and Steve M. McClung, d/b/a Glacier Construction Company, App. No. P-71053 (December 1987).

When a supporting shipper requires a combination of support services in conjunction with transportation and when no existing carrier is shown to be able to provide the complete service, contract carrier authority may be granted. RCW 81.80.060; WAC 480-12-255. Order M. V. No. 136658, In re Keener's, Inc., d/b/a K & N Meats, App. No. P-70608 (September 1987).

When a proposed contract carrier service combines transportation and services unrelated to transportation, the Commission will require that the non-transportation aspects of the service be separated for purposes of the application and regulation. RCW 81.80.060. Order M. V. No. 133416, In re Gary G. Brister d/b/a G & G Transfer, App. No. P-69123 (February 1986).

**RCW 81.80.070 Grant or denial of permit\*\*****SUBDIVISIONS OF NOTES:****Common Carriers:**

**General**  
**Affirmative Action/Minority Status**  
**Benefits of Competition**  
**Brokers**  
**Burden of Proof**  
**Dual Operations**  
**Ex Parte**  
**Fitness - Ability**  
**Fitness - Ex Parte**  
**Fitness - Financial**  
**Fitness - Unauthorized Compensation**  
**Fitness - Unauthorized Operations**  
**Need for Service**  
**Preference**  
**Protestants - Effect On**  
**Protestants - Obligation to Make Self Known**  
**Protestants - Problems With**  
**Public Convenience**  
**Rates**  
**Restrictions In Permit**  
**Search for Service**  
**Specialized Equipment or Service**  
**Territory**

**Contract Carriers:**

**General/Definition/**  
**Differences from Common Carrier**  
**Dual Operations**  
**Fitness**  
**Preference**  
**Public Interest/Public Interest Factors**

**Entry Common Carriers: General**

The standards of regulatory fitness, public interest, and public convenience and necessity are no longer relevant to the determination of who should receive a motor carrier permit. In order to receive a permit now, an applicant must show proof of insurance and pass a safety fitness review. RCW 81.80.070; WAC 480-14-180, WAC 480-14-190. Order M. V. No. 148448, In re Merrel Cline, d/b/a Courtesy Mobile Home Service, App. No. P-77402 (February 1995).

Until a federal law that would preempt the state's regulation of a category of intrastate transportation becomes effective, the Commission is bound to continue to implement the state's law, but it may take into consideration events at the national level in doing so. RCW 80.01.040; 81.80.070. Order M. V. No. 148152, In re Beasley Construction, Inc., App. No. P-77709 (August 1994).

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\*\* NOTE: The Federal Aviation Administration Authorization Act of 1994, P.L. 103-305, enacted in August 1994, preempted state economic regulation of intrastate motor carrier operations with the exception of household goods movers and common carrier brokers effective January 1, 1995. States are permitted to continue size and weight and hazardous materials enforcement, and safety and insurance regulation.



## **RCW 81.80.070**

### **General (cont.)**

Temporary authority is an appropriate solution to transportation shortages that occur during peak harvest seasons, but it is not necessarily the exclusive solution. RCW 81.80.070 (entry common carriers: general) RCW 81.80.170; WAC 480-12-033. Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).

RCW 81.80.170, rather than RCW 81.80.070, governs a grant or denial of temporary authority. RCW 81.80.070; RCW 81.80.170; WAC 480-12-033. Order M. V. No. 146831, In re Rombough, Scot & Tamura, Joseph, d/b/a R/T Delivery, App. No. P-76921 (August 1993).

An order need not find that proposed service would unreasonably congest the highways or tend to impair the stability and dependability of existing service if it does not base denial upon those elements. RCW 81.80.070; 81.80.020. Order M. V. No. 146279, In re Gayle G. Reed, d/b/a Gayle Reed Trucking, App. No. P-76302 (March 1993).

The prohibition in WAC 480-12-050(5) against separating a commodity from a class of substantially related commodities or a commodity classification relates to transfers of authority, not to original grants of authority. RCW 81.80.070 (entry common carriers: general); WAC 480-12-050(5). Order M. V. No. 146110, In re System Transfer of Longview, Inc., App. No. E-75475 (February 1993).

The Commission will not permit subterfuges to cloud the true nature of carrier operations or to control their regulatory treatment. RCW 81.80.070. Order M. V. No. 145969, In re Affordable Rental Movers, Inc. and Affordable Truck Rental, Inc., Hearing No. H-5009 (January 1993).

An operation which holds itself out to the public as a mover of household goods over the state's highways for compensation, and which conducts such transportation in leased vehicles or by operating in tandem with a related entity that provides the vehicles, is a common carrier subject to Commission regulation. RCW 81.80.010(4); 81.80.070. Order M. V. No. 145969, In re Affordable Rental Movers, Inc. and Affordable Truck Rental, Inc., Hearing No. H-5009 (January 1993).

In determining whether a person is providing services that require Commission permit authority, it is irrelevant whether the person owns, leases, rents, or borrows the vehicles it uses in transporting the goods of others. RCW 81.80.010(4); 81.80.070. Order M. V. No. 145969, In re Affordable Rental Movers, Inc. and Affordable Truck Rental, Inc., Hearing No. H-5009 (January 1993).

### **Entry Common Carriers: Affirmative Action/Minority Status**

A grant of authority on the basis of minority status alone is improper, but a bona fide shipper need that results from the application of affirmative action law or rule may be considered, in addition to other relevant evidence, in determining whether to grant an application for common carrier authority. RCW 81.80.070 (entry common carriers: affirmative action; need for service).

Order M. V. No. 148344, In re Gloria & Roosevelt Randall d/b/a Gloria Jeane Hauling, App. No. P-77650 (December 1994).

Order M. V. No. 135886, In re Fin-A-Key Express, Inc., App. No. P-68437 (May 1987).

**Affirmative Action/Minority Status (cont.)**

Affirmative action may constitute a requirement within the meaning of "public convenience and necessity."

When use of a certified Minority Business Enterprise assists supporting shippers in meeting affirmative action goals established by law, and no other Minority Business Enterprise carriers are shown to be available, a grant of authority is proper. RCW 81.80.070 (entry common carriers: affirmative action). Order M. V. No. 139639, In re Robert Earl Overby, d/b/a R.E.O. Delivery Service, App. No. P-72188 (June 1989).

A grant of authority on the basis of minority status alone is improper, but evidence about the shipper's ability to meet proportional contracting requirements established by law may be considered in evaluating public need for the carrier. RCW 81.80.070 (entry common carriers: affirmative action; need for service). Order M. V. No. 139639, In re Robert Earl Overby, d/b/a R.E.O. Delivery Service, App. No. P-72188 (June 1989).

An applicant must show a bona fide shipper need for increased minority services in order to establish a need for a minority-owned carrier. When supporting shippers have been able to find minority truckers to enable them to meet their affirmative action goals, no bona fide need has been shown. RCW 81.80.070 (entry common carriers: need for service; affirmative action). Order M. V. No. 136719, In re Arnold Finkbonner & Sons, Inc., App. No. E-19414 (October 1987).

Each applicant must demonstrate its fitness, willingness and ability to conduct operations, and those facts may not be properly affected by affirmative action considerations. RCW 81.80.070 (entry common carriers: affirmative action). Order M. V. No. 135886, In re Fin-A-Key Express, Inc., App. No. P-68437 (May 1987).

A desire to give traffic to minority contractors, without a showing that an additional minority carrier will enhance transportation service or provide transportation service not presently available to the supporting shipper, does not demonstrate that the public convenience and necessity require another carrier. RCW 81.80.070 (entry common carriers: affirmative action). Order M. V. No. 133403, In re Fin-A-Key Express, Inc., App. No. P-68437 (March 1986).

The fact that the applicant is a woman and her employment would help a shipper qualify for government contracts is not a business purpose related to transportation that will satisfy the statutory requirements for a grant of authority from the Commission. RCW 81.80.070 (entry common carriers: affirmative action). Order M. V. No. 132229, In re Norma M. Banaka, App. No. P-68722 (July 1985).

Testimony from a supporting shipper that by law he was required to give a percentage of his work to a minority contractor, that no other parts of a job were available for minority operation, and that a search discovered no other minority carrier able to perform work, may be considered in judging public need for additional service. RCW 81.80.070 (entry common carriers: affirmative action). Order M. V. No. 129312, In re Charles Wayne d/b/a J. R. Concrete Works, App. No. E-18836 (March 1984).

## **RCW 81.80.070**

### **Entry Common Carriers: Benefits of Competition**

The Commission may consider the benefits of competition in determining whether to grant a common carrier application. When it appears from the evidence that addition of an authorized carrier may encourage the protestants to pursue efficiencies and quality in service and to promote the service and quote rates, in a way that will improve the overall service to the public, a grant of new authority may be appropriate. RCW 81.80.070 (entry common carriers: benefits of competition). Order M. V. No. 148807, In re Thurston, Richard d/b/a Kratos Transport, App. No. E-78363 (April 1996).

In an application for common carrier authority, the Commission may consider the benefits of competition only when the evidence demonstrates some benefit from competition beyond the mere existence of an additional carrier. RCW 81.80.070 (entry common carriers: benefits of competition).

Order M. V. No. 146200, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-76068 (March 1993).

Order M. V. No. 138504, In re Lynn Penfold, App. No. P-71341 (October 1988).

Order M. V. No. 136191, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (July 1987).

Order M. V. No. 135702, In re Cartin Delivery Service, Inc., App. E-19099 (April 1987).

Witnesses who do not have the authority to select a common carrier or who simply favor competition do not support a grant of additional authority. RCW 81.80.070 (entry common carriers: need for service; benefits of competition). In re Roy Holman, d/b/a Early Star Trucking, App.No. P-73252 (February 1991).

When there is no credible demonstration of market dominance, or if there is no demonstration of how such dominance might prejudice the public convenience and necessity or how a grant of authority would ameliorate that dominance, the evidence is insufficient to require a grant of authority. RCW 81.80.070 (entry common carriers: benefits of competition). Order M. V. No. 138588, In re Wes-Pac Transportation Co., Inc. d/b/a Wes-Pac, App. No. E-19525 (November 1988).

The Commission may consider the benefits of competition in determining whether to grant a common carrier application, but any such benefits must be identified specifically in the record. RCW 81.80.070 (entry common carriers: benefits of competition). Order M. V. No. 138234, In re Inter-run, Inc., d/b/a Inter-run, App. No. P-71544 (August 1988).

If an applicant can show that the competitive environment improved after it commenced good faith operations, a grant of authority may be appropriate. RCW 81.80.070 (entry common carriers: benefits of competition; fitness). Order M. V. No. 135023, In re Washington Trucking, Inc., App. No. E-19174 (November 1986).

The performance of services under temporary authority do not alone show need for an additional carrier, but when a grant of temporary authority stimulated an increase in service by all existing authorized carriers, the Commission may conclude that the grant to the applicant benefitted the public interest. RCW 81.80.070 (entry common carriers: benefits of competition; need for service). Order M. V. No. 131565, In re United Truck Lines, Inc., App. No. E-18895 (March 1985).

**Entry Common Carriers: Brokers**

**Cross Reference**

< See WAC 480-12-100

When supporting shippers do not require brokerage services, they do not demonstrate need for a common carrier broker. RCW 81.80.070 (entry common carriers: broker). Order M. V. No. 144656, In re Nippon Express U.S.A., Inc. (NITTSU), App. No. P-74686 (March 1992).

Although a broker must prove that its proposed service is reasonably required by present or future public convenience and necessity, the required proof is not identical to the proof a common carrier must produce. To demonstrate that a broker is needed, an applicant must show that a shipper has a need for the arrangement of transportation and that existing brokers are unable to provide the service. RCW 81.80.070 (entry common carriers: brokers); WAC 480-12-100(2). Order M. V. No. 130356, In re Continental Traffic Company, Inc., App. No. P-67117 (September 1984).

**Entry Common Carriers: Burden of Proof**

**Cross Reference**

< Necessity of Live Shipper Testimony On Protested Applications: See WAC 480-12-045.

**Appellate decision.** Although the applicant bears the initial burden of demonstrating need and protestants have no burden to demonstrate lack of need, when the protestants elect to testify, yet fail to state that they are willing and able to provide the particular services that the shippers require, the Commission is entitled to conclude that the protestants are not fully able to meet those precise needs. RCW 81.80.070 (entry common carriers: burden of proof). Oregon Freightways, et al., v. WUTC and Silver Eagle Company, Cause No. 28779-6-I, Court of Appeals, Division One (August 1992)(**Unpublished Opinion**); affirming Order M. V. No. 141041, In re Silver Eagle Company, App. No. E-19774 (March 1990).

The burden is on the applicant to prove need for additional common carrier authority, not on the existing carriers to disprove need. RCW 81.80.070 (entry common carriers: burden of proof; protestants: problems with).

Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

Order M. V. No. 138744, In re Rick Kamstra, d/b/a Kamstra Trucking, App. No. E-19686 (December 1988).

When a portion of broad territory is protested, and the protestant submits credible evidence that it makes itself known to the community in that portion and that it can handle additional business, the applicant must present evidence of need within the protested portion to demonstrate that the public convenience and necessity require an additional carrier in that portion. RCW 81.80.070 (entry common carriers: (burden of proof; need for service; territory). Order M. V. No. 146358, In re Steve Karabach, d/b/a Steve Karabach Trucking, App. No. E-76408 (April 1993).

**Burden of Proof (cont.)**

## **RCW 81.80.070**

An applicant has the burden of establishing its fitness. RCW 81.80.070 (entry common carriers: burden of proof; fitness-unauthorized operations). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

The burden is on an applicant to prove need for additional authority, not on the protestants to disprove need, and when the applicant fails to make a prima facie showing that another carrier is needed, the protestants' inability to serve all the needs of the shippers has no bearing on the outcome. RCW 81.80.070 (entry common carriers: burden of proof; protestant--problems with). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

An applicant for new common carrier authority must make a prima facie demonstration of need for the authority it seeks; if it fails to do so, the application will be denied. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

To make a prima facie showing of need for new common carrier authority, an applicant must produce credible evidence from one or more shippers that they have real transportation requirements and that existing service is not sufficient to meet their needs. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

Speculative allegations that a proposed service might violate federal postal laws, which are not established by the record, will not require denial of an application. RCW 81.80.070 (entry common carriers: burden of proof); 81.80.130. Order M. V. No. 143056, In re D & D ICS Group, Inc., d/b/a Insurance Courier Services, App. No. P-73119 (April 1991); recon. denied, Order M. V. No. 143513 (July 1991).

Although an applicant has the burden of demonstrating its fitness, once it has made a prima facie showing, contrary evidence must be sufficiently specific and detailed to overcome that showing. RCW 81.80.070 (entry common carriers: fitness-ability; burden of proof). Order M. V. No. 141006, In re Becker Trucking, Inc., d/b/a Becker Trucking: Becker Express, App. No. E-19787 (March 1990).

A proposed order's failure to find that the protestant would not be adversely affected by a grant of authority is immaterial when the applicant has not demonstrated that an additional carrier is required. RCW 81.80.070 (entry common carriers: burden of proof; protestants-effect on). Order M. V. No. 133660, In re Washington Trucking, Inc., App. No. E-19174 (March 1986).

The withdrawal of protests does not excuse an applicant from proving that the public convenience and necessity require another carrier. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 131975, In re Thomas K. Munro, App. No. E-19065 (June 1985).

### **Burden of Proof (cont.)**

The fact that existing carriers would not be harmed by a grant of authority is not a proper foundation upon

which a grant may be based. The standard of public convenience and necessity requires that the decision whether to grant authority be based on the public need for another carrier. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 130148, In re Common Carriers, Inc., App. No. E-18729 (August 1984).

An unprotested application for authority must meet the minimum standard of proof that the public convenience and necessity call for the proposed service. RCW 81.80.070 (entry common carriers: burden of proof; need for service); WAC 480-12-045(6). Order M. V. No. 129315, In re Donald W. Lemmons d/b/a Interstate Wood Products, App. No. E-18789 (April 1984).

Even though an applicant can demonstrate that a particular protestant cannot handle the traffic in question, the applicant is not relieved of the burden of demonstrating that the public convenience and necessity require an additional carrier. RCW 81.80.070 (entry common carriers: burden of proof). Order M. V. No. 128061, In re James D. Hanson d/b/a Earl Hanson Trucking Co., App. No. E-18676 (August 1983).

Evidence that the protestant has had a few isolated service failures over a period of years does not demonstrate a need for additional authority. A standard of 100 percent satisfactory service would place an unreasonably high burden on existing carriers. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 126825, In re Lynden Transport, Inc. d/b/a Milky Way, Inc., App. No. E-18534 (January 1983).

Official notice of an order in a similar case, which the Commission affirmed without comment is inappropriate because the order is of no probative value on the issue of whether this applicant has met its statutory burden of showing need for an additional carrier. RCW 81.80.070 (entry common carriers: burden of proof; need for service); Former WAC 480-08-190. Order M. V. No. 126825, In re Lynden Transport, Inc., d/b/a Milky Way, Inc., App. No. E-18534 (January 1983).

An applicant for a common carrier permit must demonstrate that the public convenience and necessity, either at the present or in the future, require an additional carrier with authority in the territory sought to be served. This is traditionally shown by evidence from shippers who have not been or will not be able to secure the kind of transportation service needed, despite a reasonable effort to secure it. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 126429, In re Glenn Mar, Inc., App. No. P-65982 (November 1982).

### **Entry Common Carriers: Dual Operations**

A transferee with common carrier authority may acquire overlapping contract carrier authority by transfer unless there is a credible demonstration of a likelihood that contract shippers will receive impermissible preferences. RCW 81.80.070 (entry common carriers: dual operations; contract carriers: dual operations).

## **RCW 81.80.070**

Order M. V. No. 138953, In re Western Way, Inc./Jim's Transfer, Inc., d/b/a DeVries Packing and Storage, App. No. P-71767 (January 1989).

A grant of authority by the Commission should not result in duplication of authorities among affiliated carriers. When such duplication results, the Commission may condition the grant upon receipt of the applicant's written agreement to the amendment of an affiliated permit to exclude the duplicated authorities.

RCW 81.80.070 (entry common carriers: dual operations; contract carriers: dual operations). Order M. V. No. 136566, In re Gambler Construction, Inc., App. No. P-70780 (September 1987).

### **Entry Common Carriers: Ex Parte Processing of Application**

#### **Cross Reference**

< See WAC 480-12-045

Written shipper statements may be received in support of unprotested authority. If the shipper support statements are sufficient, a grant of authority will be made. RCW 81.80.070 (entry common carriers: ex parte); WAC 480-12-045(6). Order M. V. No. 140879, In re Jim Canaday, d/b/a Canaday Farms, App. No. E-19829 (February 1990).

Uncontested portions of an application may be processed ex parte and will be granted when the applicant submits shipper support statements demonstrating that the public convenience and necessity require additional common carrier authority. RCW 81.80.070 (entry common carriers: ex parte). Order M. V. No. 138451, Carrell Crane & Heavy Hauling, Inc., App. No. E-19595 (October 1988).

Unprotested matters are subject to hearing and review. Ex parte action at applicant's request is not appropriate when it would avoid review of a proposed order that finds an applicant unfit to provide service.

RCW 81.80.070 (entry common carriers: ex parte; fitness); Former WAC 480-08-240(13). Order M. V. No. 136789, In re Roy N. Carlson, Inc., App. No. P-70991 (October 1987).

### **Entry Common Carriers: Fitness - Ability**

#### **Cross References**

< Reviewing Initial Order's Credibility Findings: See RCW 34.05.464.

It is not in the public interest to grant permit authority to a carrier that has not demonstrated its fitness to conduct operations. RCW 81.80.070 (entry common carriers: fitness-ability). Order M. V. No. 146257, In re Allen Dale Frank, d/b/a Economy Delivery, App. No. P-75994 (March 1993).

### **Fitness - Ability (cont.)**

A small number of relatively minor violations, not indicating an unwillingness or inability to comply with regulatory requirements, do not demonstrate a transferee's unfitness to operate authority. RCW 81.80.270; RCW 81.80.070 (entry common carriers: fitness-ability). Order M. V. No. 145901, In re Horizon Trucking, Inc./Horizon Trucking & Excavating Co., Inc., App. No. P-75496 (January 1993); Order M. V.

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No. 146106, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-75654 (February 1993).

An unprotested applicant for common carrier service who demonstrates need for the proposed service need not commit to hiring employees to serve an unspecified level of speculative future need; a carrier's obligation is to provide service to the general public to the extent of its resources, and an applicant must make a commitment to do so. RCW 81.80.070 (entry common carriers: fitness-ability). Order M. V. No. 145721, In re Gerald W. Southards, d/b/a J-S Trucking, App. No. P-75956 (December 1992).

When an applicant has operated in violation of Commission rules in the past, but its history does not indicate a pattern of intentional violation or blatant disregard of Commission rules, and the applicant gives credible assurances of willingness to comply in the future, the Commission may find the applicant fit. RCW 81.80.070 (entry common carriers: fitness-ability). Order M. V. No. 144670, In re Okanogan Seattle Transport, Inc., App. No. E-75113 (March 1992).

The Commission may view the record to determine whether objective evidence contradicts a finding of fitness. RCW 34.05.461(3); RCW 34.05.464(4); RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 141581, In re Gary Merlino Construction Co., Inc., App. No. E-19841 (June 1990).

Although an applicant lacks equipment at the time of hearing, a demonstration of financial ability both to conduct the operations and to acquire additional equipment, establishes applicant's ability to perform the services proposed. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 141052, In re Tomas Moreno Deleon, App. No. E-19837 (March 1990).

Although an applicant has the burden of demonstrating its fitness, once it has made a prima facie showing, contrary evidence must be sufficiently specific and detailed to overcome that showing. RCW 34.05.461(4); RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 141006, In re Becker Trucking, Inc., d/b/a Becker Trucking: Becker Express, App. No. E-19787 (March 1990).

An applicant who fails to establish a disputed element of its basic case--such as fitness, willingness or ability--should not be allowed additional time to supplement its showing; rather, the application should be denied, based on a failure to meet statutory requirements. RCW 81.80.070 (entry common carriers: fitness - ability, ability). Order M. V. No. 140840, In re Mayne Nickless Courier Systems, Inc., d/b/a Bucky's Courier Systems, App. No. P-72291 (January 1990).



## **RCW 81.80.070**

### **Fitness - Ability (cont.)**

An applicant's existing contract carrier authority is not evidence of its fitness to receive additional authority. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 140431, In re Ell Transport, Inc., App. No. E-19683 (October 1989).

An attempt to disguise an impermissible owner-operator arrangement, whose essential element is a division of revenue, bears on the transferee's fitness to conduct operations. RCW 81.80.070 (entry common carriers: fitness - ability); WAC 480-12-210(1)(d). Order M. V. No. 139898, In re North Counties Freight Lines, Inc./Mayne Nickless Courier Systems, Inc., d/b/a Bucky's Courier Systems, App. No. P-71191 (July 1989).

A proposed order's specific finding of the applicant's credible assurance of future compliance supported by substantial evidence on the record, will not be disturbed on review. Former RCW 34.04.110; RCW 81.80.070 (entry common carriers: fitness - ability); Former WAC 480-08-240(13). Order M. V. No. 139688, In re Elmer Cook Trucking, Inc., App. No. E-19682 (June 1989).

A mobile home transportation service seeking an extension of authority fails to demonstrate its fitness to conduct the proposed operations when it also owns a mobile home dealership that was not engaged in a bona fide brokerage or combination of services arrangement, but was instead engaging in subterfuge to circumvent the law. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 138506, In re Randy and Denise Cooper and Jon and Kelly Port, d/b/a Central Washington Mobile Home Transport and Services, App. No. E-19540 (October 1988).

When the applicant has operated illegally in the past, but there is no history of repeated, blatant illegal operations, and no objective evidence contrary to a finding of fitness, the Commission will place substantial reliance on the presiding officer's determination of the applicant's good faith. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 137626, In re Robert L. Johnson, d/b/a Postal Express, App. No. P-71118 (May 1988).

When an applicant fails to disclose fully its ownership on an application, and upon examination except in response to direct questioning, and when initial disclosure could have revealed the possibility of affiliation among applicants for substantially identical service--in possible contravention of rule--the Commission will decline to enter a finding that an applicant is fit to provide service. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 137751, In re Nelson & Nelson Logging, Inc., App. No. P-71359 (May 1988).

A finding of fitness in a grant of temporary authority does not ban inquiry into the applicant's fitness in a parallel-filed transfer application. RCW 81.80.070; WAC 480-12-033(2). Order M. V. No. 137290, In re All West Auto Transport Co., App. No. P-71755 (March 1988).

When an applicant demonstrates a credible commitment to comply with Commission rules and laws of the state, a proposed finding of fitness will not be disturbed even though the applicant lacks detailed knowledge at the time of hearing of the tariff under which it will operate. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 137103, In re Cimarron Cedar Products, Inc., App. No. P-71019 (December 1987).

### **Fitness - Ability (cont.)**

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A commitment to charge lawful tariff rates is sufficient to permit a finding of fitness, even when an applicant does not know details of the tariff. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 136658, In re Keener's, Inc., d/b/a K & N Meats, App. No. P-70608 (September 1987).

When an applicant fails to make a prima facie case that another carrier is needed or that it is fit to conduct operations, a finding of improper action by a protestant has no bearing upon the outcome of the proceeding. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 135885, In re Ronald W. Shane, d/b/a Shane's Excavating, App. No. P-70559 (May 1987).

When there is substantial evidence that the transferee would be able, and desires to comply with the law and regulation were the application granted, a finding of fitness in the proposed order will not be disturbed. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 130930, In re Courtesy Moving & Storage, Inc./OMI, Inc., App. No. P-67939 (December 1984).

Allegations of a poor health and safety record on matters unrelated to transportation are not relevant to the issue of an applicant's fitness to hold common carrier authority. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 130721, In re Crosby & Overton, Inc., App. No. P-66968 (October 1984).

Credible evidence that an applicant presently possesses some equipment, and that more equipment will be leased when needed, supports a proposed finding that the applicant is able to perform the proposed service. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 129312, In re Charles of Wayne d/b/a J. R. Concrete Works, App. No. E-18836 (March 1984).

The Commission determines fitness by judging whether the carrier will, if authorized, have the ability and willingness to operate within the law. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 128210, In re C & C Air Freight, Inc., App. No. E-18764 (September 1983).

Prior operation without violation under a now-transferred permit goes only to the ability of applicant to operate in compliance with the law, and does not show need for an additional carrier in his former territory. RCW 81.80.070 (entry common carriers: fitness-ability; need). Order M. V. No. 128115, In re Kenneth D. Peterson, d/b/a Ken D. Peterson Trucking, App. No. P-67040 (September 1983).

An applicant who works primarily for one shipper but also holds itself out to the public is not operating in a manner inconsistent with common carriage. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 127454, In re Earl A. & Michael E. Green d/b/a Monax Trucking, App. No. E-18709 (May 1983).

When penalty assessments have been made against a protestant, but when no showing is made of a reasonable likelihood that the carrier is likely to be suspended or its permit cancelled, the assessments as such cannot be said to affect the protestant's ability to serve the shippers. RCW 81.80.070 (entry common carriers: fitness-ability). Order M. V. No. 126825, In re Lynden Transport, Inc. d/b/a Milky Way, Inc., App. No. E-18534 (January 1983).

**Fitness - Ability (cont.)**

Evidence that a carrier is a small family-owned business shows no greater ability to serve the public than

## **RCW 81.80.070**

does any other form of business. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 126429, In re Glenn Mar, Inc., App. No. P-65982 (November 1982).

When a current carrier transports equipment that is smaller but similar to oil field equipment, experience on the smaller equipment supports a finding that the carrier can transport the larger rigs. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

When an equipment lease is sufficient on its face, speculation regarding possible improper operations thereunder or that the lease might terminate on short notice is not persuasive. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

When an applicant cannot explain the details of an interlease agreement, does not possess the type of equipment to transport the commodities applied for, and does not demonstrate familiarity with regulations, it has not met its burden of showing that it is fit, willing, and able. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 126084, In re Tacoma Hauling Co., Inc., App. No. E-18498 (October 1982).

A carrier who is proposing to transport frozen foods, but who possesses only nonrefrigerated flatbed equipment, and who has stated an unwillingness to carry relatively small shipments with deadhead mileage, has not demonstrated that it possesses the ability to perform the transportation in question. RCW 81.80.070 (entry common carriers: fitness - ability). Order M. V. No. 126084, In re Tacoma Hauling Co., Inc., App. No. E-18498 (September 1982).

### **Entry Common Carriers: Fitness - Ex Parte**

Unprotested matters are subject to hearing and review. Ex parte action at applicant's request is not appropriate to avoid review of a proposed order that finds an applicant unfit to provide service. RCW 81.80.070 (fitness); Former WAC 480-08-240(13). Order M. V. No. 136789, In re Roy N. Carlson, Inc., App. No. P-70991 (October 1987).

### **Entry Common Carriers: Fitness - Financial**

#### **Cross Reference**

< Reviewing Initial Order's Credibility Findings: See RCW 34.05.464.

A financial statement alone is insufficient to establish fitness when the testimony of the applicant's sole witness contradicts the financial statement, and the witness' answers to questions about the applicant's finances are vague and inconsistent. RCW 81.80.070 (entry common carriers: fitness-financial). Order M. V. No. 146819, In re Ram Singh, d/b/a Singh Delivery Service, App. No. P-76040 (July 1993).

**Fitness - Financial (cont.)**

When an applicant refuses to define clearly its assets and liabilities or present a balance sheet or other relevant financial information demonstrating its ability to conduct operations, there is insufficient information upon which the Commission can base a finding of fitness to conduct operations. RCW 81.80.070 (entry common carriers: fitness-financial). Order M. V. No. 146379, In re Brian C. McCulloch, d/b/a Parallax Moving Systems, App. No. P-76085 (April 1993).

The Commission will deny an application if the applicant refuses to provide the Commission with sufficient financial information to enable it to determine the applicant's financial ability to conduct the proposed operations. RCW 81.80.070 (entry common carriers: fitness-financial). Order M. V. No. 146379, In re Brian C. McCulloch, d/b/a Parallax Moving Systems, App. No. P-76085 (April 1993).

When an applicant fails to provide a financial statement or other objective evidence from which the Commission can determine whether it has financial resources sufficient to conduct its proposed operations, and the testimony concerning applicant's finances is not credible, the Commission will find that the applicant is not financially fit to conduct the proposed operations. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 146257, In re Allen Dale Frank, d/b/a Economy Delivery, App. No. P-75994 (March 1993).

When the applicant is a corporation but the financial information the applicant provides is a mixture of corporate and shareholder finances, when the operating witness cannot clearly define the corporation's assets and liabilities, and when the information presented is incomplete, inconsistent, and unclear, there is insufficient information upon which the Commission can base a finding of fitness. RCW 81.80.070 (entry common carriers: fitness-financial). Order M. V. No. 145701, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1992).

Events occurring after a hearing that appear to cast substantial doubt upon an applicant's fitness to conduct operations support reconsideration and reopening. The danger to the public interest of allowing an unfit carrier to operate may require the Commission to investigate when credible allegations are made that an applicant's fitness presentation at the hearing does not accurately reflect its present circumstances. RCW 81.80.070 (entry common carriers: fitness-financial); WAC 34.05.470; 480-09-810. Order M. V. No. 145701, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1992).

Although an applicant lacks equipment at the time of hearing, a demonstration of financial ability both to conduct the operations and to acquire additional equipment establishes the applicant's ability to perform the services proposed. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 141052, In re Tomas Moreno DeLeon, App. No. E-19837 (March 1990).

An applicant may be financially fit to conduct the proposed operations and yet not have sufficient suitable equipment and personnel to provide the proposed service. Fitness is not the same as willingness or ability. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 140955, In re United Couriers, Inc., App. No. E-19716 (February 1990).

## **RCW 81.80.070**

### **Fitness - Financial (cont.)**

An applicant whose existing business operation shows it is able to meet its obligations, and whose proposed service would require no additional purchase of equipment or hiring of personnel, has established its financial fitness. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 140746, In re Yakima Valley Disposal, Inc., App. No. P-72643 (January 1990).

An applicant cannot establish fitness by providing a mixture of corporate and shareholder finances, when the operating witness can neither clearly define the corporation's assets and liabilities nor present a balance sheet or other relevant information for the applicant corporation. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 139903, In re Northwest Meter Reading, Inc., App. No. P-72180 (July 1989).

A denial of authority based on the lack of financial viability of a particular service should be based upon specific evidence and should cite reasons. Former RCW 34.04.120; RCW 81.80.070 (contract). Order M. V. No. 139493, In re Jim Elsbree, d/b/a J & P Trucking, App. No. P-71880 (May 1989).

An applicant for contract carrier authority is required to make a prima facie case that it has the financial and organizational ability to conduct the proposed operations. An applicant that shows the financial ability to conduct operations with its present business structure will be found to have the ability to operate despite a pending business reorganization whose details had not been finalized. RCW 81.80.070 (fitness - financial). Order M. V. No. 136658, In re Keener's, Inc., d/b/a K & N Meats, App. No. P-70608 (September 1987).

The Commission will reject a finding that the applicant is not financially fit if the applicant makes a prima facie case of financial viability, and there is no specific opposing evidence. Entry of a finding that a carrier is not financially fit should be supported by specific evidence regarding costs and revenues unless the evidence is otherwise patent. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 134850, In re Karen K. Urban, d/b/a Rush Delivery Service, App. No. E-19255 (October 1986).

When the record contains evidence that applicant's personal financial strength is sufficient to maintain operations, and the proposed order so finds, exceptions to the finding of financial fitness based upon the carrier's proposal to purchase the corporation's stock from corporate earnings will be denied. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 133428, In re Dale Locke/Brader Hauling Service, Inc., App. No. P-68902 (February 1986).

Speculation that an applicant's debt service on equipment could total 20 percent of revenue and prevent the carrier from receiving a reasonable rate of return will be rejected when the carrier is charging the Commission's tariff rates. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 133246, In re Mountain Logging, Inc., App. No. E-19084 (January 1986).

If the carrier's financial evidence indicates that the carrier's financing is sufficient for it to operate, the Commission will find the carrier financially fit. Speculation that the financing of new equipment could cause the carrier to go bankrupt will be rejected. RCW 81.80.070 (fitness - financial). Order M. V. No. 133246, In re Mountain Logging, Inc., App. No. E-19084 (January 1986).

### **Fitness - Financial (cont.)**

When an applicant fails to provide a written financial statement, but the applicant's testimony concerning finances is found credible by the presiding officer and there is no evidence that would show that the statement is not credible, a finding of financial fitness will be affirmed. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 133031, In re Circle M. Construction Co., Inc., App. No. E-19113 (December 1985).

When an applicant demonstrates sufficient financial strength to conduct operations, with a history of increasing revenues under temporary authority, a proposed finding of insufficient financial viability that was made without an analysis of costs and revenues will be rejected. RCW 81.80.070 (entry common carriers: fitness - financial). Order M. V. No. 131682, In re Ralph L. and Nancy L. Giesy d/b/a Giesy Delivery, App. No. P-68063 (April 1985).

#### **Entry Common Carriers: Fitness - Unauthorized Compensation**

A carrier who accepted barter as compensation for hauling heavy machinery, but whose assertion of willingness to comply with the statutes and regulations of the Commission is found credible, may be found fit to conduct operations. RCW 81.80.070 (entry common carriers: fitness - unauthorized compensation). Order M. V. No. 127915, In re Robert C. Wolford d/b/a Bobby Wolford Trucking & Salvage, App. No. E-18683 (July 1983).

When a carrier under temporary authority admits making charges below the authorized rate, but has since corrected the charges; when the presiding officer has had an opportunity to observe the demeanor of the witness on the stand; and when nothing indicates that the undercharge was aggravated or deliberate, the Commission may find that the applicant is fit to conduct operations. RCW 81.80.070 (entry common carriers: fitness - unauthorized compensation). Order M. V. No. 126632, In re Northwest Fuel Co., Inc., App. No. P-66026 (December 1982).

#### **Entry Common Carriers: Fitness - Unauthorized Operations**

##### **Cross References**

- < Reviewing Initial Order's Credibility Findings: See RCW 34.05.464.
- < Applicant Has Burden of Establishing Fitness: See RCW 81.80.070 (entry common carriers: burden).

**Appellate decision.** An exhibit is highly relevant to the issue of applicant's propensity to obey Washington's regulations when it contains documents recording 233 violations, and many of the documents are copies of applicant's own records. Former RCW 34.04.100; RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

## RCW 81.80.070

### **Fitness - Unauthorized Operations (cont.)**

**Appellate decision.** Past illegal conduct per se is not a bar to granting an application, but the breadth of applicant's unlawful conduct, and the finding that applicant's promises of future compliance were not credible, together show that the Commission's determination of unfitness was not clearly erroneous. Former RCW 34.04.130(6); RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Sun Transportation Co., Inc. v. Utilities Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** An exhibit is highly relevant to the issue of applicant's propensity to obey Washington's regulations when it contains documents recording 233 violations, and many of the documents are copies of applicant's own records. Former RCW 34.04.100; RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Sun Transportation Co., Inc. v. The Utilities and Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** A willful violation of Commission law and rules affords an adequate basis for a finding of unfitness. RCW 81.80.050; 81.80.070 (entry common carriers: fitness-unauthorized operations). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

**Appellate decision.** In an application proceeding, the Commission is not required to give an applicant actual notice that it will consider evidence of the applicant's prior violations of Commission laws and rules. Washington Constitution, Article I, Section 3; RCW 81.80.070 (entry common carriers: fitness). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**).

**Appellate decision.** RCW 81.80.070's standard of fitness is not unconstitutionally vague. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

**Appellate decision.** The words "fit, willing, and able . . . to conform to the . . . requirements, rules and regulations of the commission. . . ." in RCW 81.80.070 plainly tell a person of ordinary intelligence that failure to conform to the Commission's rules jeopardizes his/her eligibility for a permit. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

When an applicant has operated unlawfully in the past, but there is no history of repeated, blatant illegal operations, the Commission will place considerable reliance on the administrative law judge's determination of the applicant's good faith, in the absence of contrary objective evidence. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).

**Fitness - Unauthorized Operations (cont.)**

When an applicant has wilfully, knowingly, and flagrantly conducted unauthorized operations over many years and is presently exceeding its temporary authority, and there is no objective evidence that would give credence to applicant's assertions at hearing that it will comply with Commission laws in the future, the Commission may find the applicant unfit to operate as a common carrier. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 146257, In re Allen Dale Frank, d/b/a Economy Delivery, App. No. P-75994 (March 1993).

When a carrier knowingly, willingly and repeatedly violates restrictions in a temporary permit, the Commission may find that it is not fit to operate as a common carrier. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 146114, In re International Port Services, Inc., d/b/a Northwest Mail Delivery Services, App. No. P-75781 (February 1993).

An applicant's repeated, continuous, unauthorized service in violation of restrictions in its temporary authority supports a finding that the applicant is unfit to serve as a common carrier. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

Unlawful activities conducted in good faith belief that they are lawful do not negate a finding of fitness. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

An applicant may establish its fitness by providing credible testimony of its intention to operate in compliance with applicable law. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 143662, In re T.W.G. Transport Ltd., App. No. P-74129 (July 1991).

Proposed operations that would violate the leasing rule in WAC 480-12-210 do not automatically disqualify an applicant on the basis of fitness. When the violations do not affect the nature of the common carrier authority, are based on a misinterpretation of the leasing rule, the carrier gives credible assurances of future compliance, and the carrier is able to conduct operations in compliance with the law, the applicant is not precluded from establishing its fitness. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations); WAC 480-12-210. Order M. V. No. 142818, In re ABC-Legal Messengers Inc., d/b/a Couriers - Today/Tonight, App. No. E-19876 (March 1991); recon. denied, Order M. V. No. 143215 (April 1991).

An applicant who has provided credible assurances of its intent to operate in compliance with the law may be found fit to conduct operations. Proposed lease agreements not in compliance with Commission rules may not impair the applicant's fitness if the agreements suffer only from technical defects that can be cured. RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 143056, In re D & D ICS Group, Inc., d/b/a Insurance Courier Services, App. No. P-73119 (April 1991); recon. denied, Order M. V. No. 143513 (July 1991).



## **RCW 81.80.070**

### **Fitness - Unauthorized Operations (cont.)**

In an equipment lease, both the lessor and the lessee are required to comply with Commission rules. An applicant who has "leased" his equipment to a carrier but then conducted operations under the lessee's permit as though it were his own may be found not fit to receive authority. RCW 81.80.070; WAC 480-12-210. Order M. V. No. 142885, In re Roy Holman, d/b/a Early Star Trucking, App.No. P-73252 (February 1991).

Express lease provisions that violate Washington law may preclude a Commission finding that applicant is fit to conduct operations. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations); WAC 480-12-210. Order M. V. No. 142136, Quad Enterprises, Inc./ Group VI, Inc., Hearing No. P-73257 (December 1990).

The Commission will not grant authority to an applicant who proposes to operate in violation of law. RCW 80.01.040; RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 142136, Quad Enterprises, Inc./ Group VI, Inc., Hearing No. P-73257 (December 1990).

The Commission may reasonably find unfit any applicant who received four citations, in four years, for operating without authority. The applicant's assurances of future compliance may be found not credible, in light of his past disregard for those laws. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 141982, In re Wirkkala Mechanics, Inc., App. No. P-73424 (October 1990).

An applicant's assurances of future compliance with Commission laws and rules, combined with objective manifestations of intent to comply, may establish the applicant's fitness notwithstanding past violations. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 141581, In re Gary Merlino Construction Co., Inc., App. No. E-19841 (June 1990).

When an applicant has knowingly and repeatedly made unauthorized hauls, but asserts at the hearing that it will comply with applicable rules and laws in the future, the Commission may find that those assurances are not credible and that the applicant has not established its fitness. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 140431, In re Ell Transport, Inc., App. No. E-19683 (October 1989).

An applicant's assurances of future compliance with Commission rules and laws may be found credible, notwithstanding past unauthorized hauls, when the applicant has discontinued the unauthorized hauls and has applied for the necessary authority. RCW 34.05.461(3); RCW 81.80.070 (entry common carriers: fitness-unauthorized operations). Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).

Documentation presented to the Commission that attempts to disguise an impermissible owner-operator arrangement whose essential element is a division of revenue, bears on the transferee's fitness to conduct operations. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations); WAC 480-12-050; WAC 480-12-210(1)(d). Order M. V. No. 139898, In re North Counties Freight Lines, Inc./Mayne Nickless Courier Systems, Inc., d/b/a Bucky's Courier Systems, App. No. P-72291 (July 1989).

### **Fitness - Unauthorized Operations (cont.)**

Testimony that an applicant will comply with the law and Commission rules provides only prima facie evidence of an applicant's fitness. Evidence that an applicant knowingly, willfully and repeatedly violated restrictions on its operating authority rebuts such evidence and supports a finding that the applicant is unfit to operate as a common carrier. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 139284, In re Common Carriers, Inc., App. No. P-72611 (March 1989).

An applicant's willful disregard of an order denying temporary authority and its failure to obtain a lawful tariff demonstrate a pattern of disregard for Commission regulation and support a finding that the applicant is unfit to receive permit authority. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

When the applicant has operated illegally in the past, but there is no history of repeated, blatant illegal operations, and no objective evidence contrary to a finding of fitness, the Commission will place substantial reliance on the presiding officer's determination of the applicant's good faith. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 137626, In re Robert L. Johnson, d/b/a Postal Express, App. No. P-71118 (May 1988).

When an applicant fails to disclose fully its ownership on an application, and upon examination except in response to direct questioning, and when initial disclosure could have revealed the possibility of affiliation among applicants for substantially identical service--in possible contravention of rule--the Commission will decline to enter a finding that an applicant is fit to provide service. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 137751, In re Nelson & Nelson Logging, Inc., App. No. P-71359 (May 1988).

When an applicant has operated unlawfully in the past but credibly demonstrates a good faith effort and willingness to comply with the rules of the Commission, a proposed finding of fitness will not be disturbed. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 137103, In re Cimmaron Cedar Products, Inc., App. No. P-71019 (December 1987).

When a permit is lawful on its face and an applicant for extension authority is operating in conformity with the permit, the applicant will not be found unfit, even though the permit language may be inconsistent with a Commission rule. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

When a reopened hearing produces evidence of a pattern of unlawful operations, the applicant may be found unfit. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 136135, In re Sorenson Transportation Co., Inc., App. No. P-69680 (July 1987).

### **Fitness - Unauthorized Operations (cont.)**

A bare assertion by the applicant of its willingness to comply with the law, even if credible, may be insufficient to overcome the weight of objective evidence of extensive past illegal practices. RCW

## **RCW 81.80.070**

81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 135885, In re Ronald W. Shane, d/b/a Shane's Excavating, App. No. P-70559 (May 1987).

When there are inconsistencies in the testimony of the applicant that are not satisfactorily explained by objective evidence, and when the applicant has admitted to a lack of truthfulness and to illegal operations in the past, the applicant has failed to demonstrate his fitness to conduct operations. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 135506, In re Zeb F. Johnson d/b/a All West Auto Transport, App. No. P-69380 (March 1987).

An order that denied authority to an applicant whose promise of future compliance was found not credible, due to 233 violations of Commission rules and statutes, will not be reversed upon a petition for reconsideration merely because the applicant alleged to have received only 50 penalty assessments. Without a showing of how the number of penalty assessments makes the assurances of future compliance more credible, the petition will be rejected. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations); Former WAC 480-08-250. Order M. V. No. 135041, In re Sun Transportation Company, Inc., App. No. P-68362 (November 1986).

A grant of temporary authority does not provide precedent for analysis of issues in a parallel application for continuing authority. A grant of temporary authority, which was made with knowledge that citations had been given to the applicant, carries no weight in the Commission's judging of an application for continuing authority. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 135041, In re Sun Transportation Company, Inc., App. No. P-68362 (November 1986).

The Commission will consider the entirety of circumstances when a carrier has met its high burden of showing that unauthorized operations were commenced in the good faith belief that the operations were lawful. A carrier who misinterpreted its permit authorizing the transportation of building materials to include the transportation of fly ash--which is sometimes used as a cement hardener--may show good faith belief that the services were lawful. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 135023, In re Washington Trucking, Inc., App. No. E-19174 (November 1986).

A finding by a presiding officer that an applicant's assertions of fitness are not credible because the applicant received 233 citations in a period of 2 months and the evidence indicates that violations have occurred since then, that is well reasoned and supported by substantial evidence, will be affirmed. Former RCW 34.04.090(7); RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 134065, In re Sun Transportation Co., Inc., App. No. P-68362 (May 1986).

### **Fitness - Unauthorized Operations (cont.)**

Evidence of a carrier's repeated violations of Commission laws and rules--despite repeated warnings to obtain a permit prior to operating as a common carrier--supports a finding that the applicant is unfit to serve as a common carrier. RCW 81.80.050; RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 132784, In re George A. Niemela, App. No. P-69133 (November 1985).

When an applicant has committed violations of law, but has demonstrated a willingness and desire to comply with the law, a proposed finding of fitness will be affirmed. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 131211, In re Don Stingle d/b/a Kitsap Development Company, App. No. P-67985 (January 1985).

A determination of an applicant's good faith will be based on objective facts. When the evidence of an applicant's good faith is ambiguous, the Commission will place substantial reliance on the determination made by the presiding officer. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations); Former WAC 480-08-240(13). Order M. V. No. 130795, In re Amalgamated Services, Inc., App. No. P-66826 (November 1984).

When applicants testify that a field agent of the Commission told them to continue operations, but the agent's conflicting testimony that he told the applicants to cease operations is found credible, a proposed finding that applicants are unfit will be affirmed. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 129662, In re Joyce Mazza & Hazel Gerber, d/b/a Action Brokerage, App. No. P-67597 (May 1984).

A carrier who engaged in operations under the erroneous belief that temporary authority had been granted by the Commission, and who ceased operations upon discovery of its error, may be found fit. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 128210, In re C & C Air Freight, Inc., App. No. E-18764 (September 1983).

An applicant who--when warned by Commission personnel--sought temporary authority after three months of operations, and who then knowingly, willingly, and repeatedly violated the restrictions on that temporary authority, could not be found fit to operate as a common carrier. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 127558, In re Jon S. Pansie d/b/a Tri-Pan Services, Inc., App. No. P-65704 (May 1983).

When an applicant erroneously interprets authority granted by the Commission, but when its interpretation is made in good faith and is logically colorable, a proposed finding of fitness will be sustained. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 127250, In re Legal Messengers, Inc., App. No. E-18687 (March 1983).

Evidence that applicant knowingly, willingly and repeatedly violated regulations can provide a basis for Commission action including suspension, cancellation, or a finding of unfitness for operations. RCW 81.80.070 (entry common carriers: fitness - unauthorized operations). Order M. V. No. 127129 In re Don Mumma Trucking, App. No. E-18665 (February 1983).

## RCW 81.80.070

### Entry Common Carriers: Need for Service

#### **Cross References**

- < Adequacy of Shippers' Search for Service: See RCW 81.80.070 (entry common carriers: search for service).
- < Affirmative Action/Minority Status as Bearing on Need: See RCW 81.80.070 (entry common carriers: affirmative action).
- < Applicant Has Burden of Establishing Need: See also RCW 81.80.070 (entry common carriers: burden; problems with protestant).
- < Necessity of Live Shipper Testimony On Protested Applications: See WAC 480-12-045.
- < Rates as a Factor: See RCW 81.80.070 (entry common carriers: rates).
- < Mere Preference Does Not Demonstrate Need: See RCW 81.80.070 (entry common carriers: preference).
- < Territory for Which Need Shown: See RCW 81.80.070 (entry common carriers: territory).

**Appellate decision.** Inadequacy of existing service is not a term that is convertible with that of public convenience and necessity, but is, rather, only one element to be considered in the determination of public convenience and necessity. RCW 81.80.070 (entry common carriers: need for service). Oregon Freightways, et al., v. WUTC and Silver Eagle Company, Cause No. 28779-6-I, Court of Appeals, Division One (August 1992)(**Unpublished Opinion**); affirming Order M. V. No. 141041, In re Silver Eagle Company, App. No. E-19774 (March 1990).

**Appellate decision.** Testimony that distributors are returning in greater numbers to the use of common carriers, does not establish a need for additional common carrier authority if existing authorized carriers who had served the distributors previously are available to haul for them. RCW 81.80.070 (entry common carriers: need for service). Sun Transportation Co., Inc. v. The Utilities and Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** When the entire record, considered as a whole, demonstrates that shippers' support of an application was based on a preference--either for applicant's driver, for a small carrier generally, or simply for an additional carrier--and applicant has failed to show the required services cannot be provided by existing carriers, then the Commission's decision denying authority was not clearly erroneous. Former RCW 34.04.130(5) and (6); RCW 81.80.070 (entry common carriers: need for service). Sun Transportation Co., Inc. v. The Utilities and Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

**Appellate decision.** Operating without a permit in territory already served by existing carriers cannot be evidence of necessity for the proposed service (distinguishing Denman v. Department of Public Works, 157 Wash. 447, 289 P. 34 (1930)). RCW 81.80.070 (entry common carriers: need for service). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

**Need for Service (cont.)**

**Appellate decision.** Reviewing courts give the Commission great deference in determining whether a proposed service is required by both public convenience and public necessity. RCW 81.80.070 (entry common carriers: need for service). Punctual Transportation, Inc. v. WUTC et al., Cause No. 13817-4-II, Court of Appeals, Division Two (December 1991)(**Unpublished opinion**); affirming Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

**Appellate decision.** Adequacy of existing service is only one element to be considered in the determination of public convenience and necessity. There need not be a specific finding that existing service is inadequate before additional service can be authorized. Black Ball Freight v. U. & T. Comm'n, 74 Wn.2d 871, 447 P.2d 597 (1968).

Need for additional service is shown by credible testimony that shippers cannot obtain the transportation they require, despite their reasonable efforts to do so. RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 145708, In re ENA Couriers (Seattle), Inc., App. No. E-75722 (October 1992).  
 Order M. V. No. 144441, In re Expedited Express, Inc., App. No. P-74573 (January 1992).  
 Order M. V. No. 143566, In re Ralph G. Sharkey, d/b/a Custom Equipment, App. No. P-73987 (July 1991).  
 Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).  
 Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).  
 Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).  
 Order M. V. No. 126429, In re Glenn Mar, Inc., App. No. P-65982 (November 1982).

Common carrier authority may be granted only upon a showing of present or future need. An applicant must present some evidence that the proposed operations are or will be required by the present or future public convenience and necessity. RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).  
 Order M. V. No. 141006, In re Becker Trucking, Inc., d/b/a Becker Trucking: Becker Express, App. No. E-19787 (March 1990).  
 Order No. 139639, In re Robert Earl Overby, d/b/a R.E.O. Delivery Service, App. No. P-72188 (June 1989).  
 Order M. V. No. 125904, In re Manufacturers Recycling Distributors, Inc. d/b/a M.R.D., Inc., App. No. P-65902 (July 1982).

## **RCW 81.80.070**

### **Need for Service (cont.)**

When the supporting shippers have had no difficulty securing satisfactory service from existing carriers, their testimony does not demonstrate a need for another carrier. RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 145820, In re Joe Guglielmelli, Jim Lilwall & Rick Spiess, d/b/a Joe Guglielmelli & Associates, App. No. E-75746 (November 1992).

Order M. V. No. 144610, In Re Raymond Drake, d/b/a Rayco Construction, App. No. P-74900 (February 1992).

Order M. V. No. 139673, In re Benito Medelez, Jr., d/b/a Medelez Trucking, App. No. E-19789 (November 1989).

Order M. V. No. 137392, In re Ronald H. Voight, d/b/a Voight Enterprises, App. No. P-70978 (March 1988).

Order M. V. No. 137090, In re Midland Transportation, Inc., App. No. E-19471 (December 1987).

In determining whether the public convenience and necessity require a proposed service, the Commission bases its decision on the factual situation existing at the time of the application.

RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 148354, In re Tiger Trucking, Inc., App. No. E-77528 (December 1994).

Order M. V. No. 144803, In re Donald A. Torgerson, d/b/a Flash Courier, App. No. P-75214 (April 1992).

Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

While proof of future need for an additional carrier must necessarily be somewhat less certain than proof of a present need, speculative testimony about future need is not a sufficient basis for a grant of authority.

RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 144104, In re Gerald O. Williams, App. No. P-74878 (October 1991).

Order M. V. No. 141858, In re Robert L. Van Diest, App. No. P-73336 (September 1990)("a chance" of future need).

Order M. V. No. 129687, In re Allen Brown d/b/a Allen Brown Woodwaste, App. No. E-18887 (May 1984).

When a shipper experiences only occasional or rare delays or service failures, and seeks service from only a limited number of carriers, the shipper does not demonstrate that the public convenience and necessity require an additional common carrier. RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 137751, In re Nelson & Nelson Logging, Inc., App. P-71359 (May 1988).

Order M. V. No. 136916, In re Blue Line Transportation Co., Inc., App. No. E-19463 (November 1987).

**Need for Service (cont.)**

A grant of authority on the basis of minority status alone is improper, but evidence about the shipper's ability to meet bona fide proportional contracting requirements established by law may be considered in evaluating public need for the carrier. RCW 81.80.070 (entry common carriers: affirmative action; need for service).

Order M. V. No. 148344, In re Gloria & Roosevelt Randall d/b/a Gloria Jeane Hauling, App. No. P-77650 (December 1994).

Order M. V. No. 139639, In re Robert Earl Overby, d/b/a R.E.O. Delivery Service, App. No. P-72188 (June 1989).

Order M. V. No. 136719, In re Arnold Finkbonner & Sons, Inc., App. No. E-19414 (October 1987).

Order M. V. No. 135886, In re Fin-A-Key Express, Inc., App. No. P-68437 (May 1987).

Proof of ongoing need is not shown by applicant's service under temporary authority; temporary authorities are granted upon demonstration of a mere prima facie case and upon a public interest standard, a different standard from the public convenience and necessity required to be shown for grants of continuing common carrier authority. RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

Order M. V. No. 141271, In re Becker Trucking, Inc. d/b/a Becker Trucking; Becker Express, App. No. P-19787 (April 1990).

Order M. V. No. 138588, In re Wes-Pac Transportation Co., Inc. d/b/a Wes-Pac, App. No. E-19525 (November 1988).

An applicant for common carrier authority must make a prima facie demonstration of need for service, regardless of whether the application is protested. The mere absence of, or withdrawal of, protestants does not itself show public convenience and necessity for a grant of authority. RCW 81.80.070 (entry common carriers: need for service).

Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).

Order M. V. No. 129315, In re Donald W. Lemmons d/b/a Interstate Wood Products, App. No. E-18789 (April 1984).

Order M. V. No. 125904, In re Manufacturers Recycling Distributors, Inc., d/b/a M.R.D., Inc., App. No. P-65902 (July 1982).

Order M. V. No. 131975, In re Thomas K. Munro, App. No. E-19065 (June 1985).

Testimony of a need for an additional mover of pianos does not establish need for an additional mover of organs. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 148807, In re Thurston, Richard d/b/a Kratos Transport, App. No. E-78363 (April 1996).

Language fluency is a reasonable necessity for a community of potential household goods moving customers who are not fluent in English. RCW 81.80.070 (entry common carriers: need ). Order M. V. No. 148596, In re Son M. Pae, d/b/a Western Moving Co., App. No. E-78164 (June 1995).



## **RCW 81.80.070**

### **Need for Service (cont.)**

The Commission may grant additional authority if existing service is not sufficient to meet shippers' reasonable need for transportation. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 148354, In re Tiger Trucking, Inc., App. No. E-77528 (December 1994).

When an applicant's proposed operations would be a definite convenience and would fill some peak season needs of shippers working in the vicinity of the jobs where the applicant works, and the transportation the shippers need is difficult to secure at peak seasons, the applicant has demonstrated need for the service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 148334, In re Frank Alfred & Lee L. Chandler, d/b/a C & C Logging Company, App. No. E-77568 (November 1994).

When supporting shippers have met their transportation requirements with their own employees and have never investigated the availability of other carriers, and a protestant provides the service in the area where the supporting shippers might need service, need for an additional carrier is not shown. RCW 81.80.070 (entry common carriers: need for service; search). Order M. V. No. 148321, In re Christopher Eric Pease, d/b/a Japanese American Mutual, App. No. P-77630 (November 1994).

That existing carriers have occasionally been unable to provide service on one day's notice does not show need for an additional carrier when service on one-day's notice is rarely a genuine requirement. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 147418, In re Charles E. & Susie P. Wirth, d/b/a Transport Northwest, App. No. P-76762 (February 1994).

When an applicant acquires authority by transfer while an application is pending, which duplicates a portion of the authority it seeks, the Commission may consider that part of the application moot. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 147418, In re Charles E. & Susie P. Wirth, d/b/a Transport Northwest, App. No. P-76762 (February 1994).

Temporary authority is an appropriate solution to transportation shortages that occur during peak harvest seasons, but it is not necessarily the exclusive solution. RCW 81.80.070 (entry common carriers: need for service); RCW 81.80.170; WAC 480-12-033. Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).

No need for additional common carrier service is shown when the supporting shipper's transportation requirements are being met satisfactorily by its current carrier, and the shipper has not inquired about the availability of its current carrier or other existing carriers to meet anticipated additional transportation requirements. RCW 81.80.070 (entry common carriers: need for service; search for service). Order M. V. No. 146200, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-76068 (March 1993).

Need for an additional carrier may be established by evidence that shippers who already use the applicant for some service would realize considerable benefit and efficiencies from a single carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 14623, In re Washington State Recovery Service, Inc., App. No. P-75864 (March 1993).

**Need for Service (cont.)**

When an applicant for common carrier authority has for many years served its clientele pursuant to a legitimate buy/sell arrangement, it is proper to consider the totality of circumstances as those circumstances relate to need and to market and service conditions. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 146106, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-75654 (February 1993).

A genuine requirement for almost immediate service, which is not being met because of a lack of locally available carriers with the necessary authority, supports a grant of common carrier authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 145784, In re Russell Yorke, d/b/a R W Yorke Trucking, App. No. E-75757 (November 1992).

The fact that a shipper's requirements are eventually met through the use of less desirable alternatives does not obviate a need for almost immediate service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 145784, In re Russell Yorke, d/b/a R W Yorke Trucking, App. No. E-75757 (November 1992).

A requirement for the hauling of materials for disposal cannot establish need for additional common carrier dump truck authority. RCW 81.80.070 (entry common carriers: need). Order M. V. No. 145450, In re Steven O. Sauer, d/b/a Steve Sauer Trucking, App. No. P-75523 (August 1992).

A protestant's refusal to make an immediate commitment to fully serve a future need that is only possible, does not show need for another carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

The Commission does not base grants of new authority upon shippers' mere perceptions of a general need for more carriers. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 145091, In re Carol Rowland, d/b/a C R Trucking, App. No. P-74823 (June 1992).

The "public convenience and necessity" test is a general standard that the legislature promulgated to guide the Commission. It is the Commission's responsibility to reasonably interpret that standard, acting within the scope of its expertise and competence, subject to judicial review. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 145091, In re Carol Rowland, d/b/a C R Trucking, App. No. P-74823 (June 1992).

Testimony that shows that a shipper's current carrier is meeting its transportation requirements satisfactorily does not demonstrate a need for additional authority. RCW 81.80.070 (need for service). Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

To make a prima facie showing of need for new common carrier authority, an applicant must produce credible evidence from one or more shippers that they have real transportation requirements and that existing service is not sufficient to meet their needs. RCW 81.80.070 (entry common carriers: burden; need for service). Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

## **RCW 81.80.070**

### **Need for Service (cont.)**

Evidence of a need for interstate transportation may not be used to support an application to provide intrastate service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144803, In re Donald A. Torgerson, d/b/a Flash Courier, App. No. P-75214 (April 1992).

The Commission may grant additional authority if existing service is not sufficient to meet shippers' reasonable needs. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144803, In re Donald A. Torgerson, d/b/a Flash Courier, App. No. P-75214 (April 1992).

The Commission may grant additional authority if existing service is not sufficient to meet shippers' reasonable need for short-notice transportation. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144823, In re C M Trucking and Construction, Inc., App. No. E-75101 (April 1992).

Testimony that a supporting shipper occasionally has difficulty finding dump truck operators during the construction season, without further indication that any of its transportation requirements have gone or will go unmet, does not alone support a finding of necessity for additional service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144701, In re Carol Rowland d/b/a C R Trucking, App.No. P-74823 (March 1992).

In determining a common carrier application, the Commission will weigh all the evidence regarding a shipper's ability to secure needed service, and will not restrict its review to protestants' ability to serve. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144701, In re Carol Rowland d/b/a C R Trucking, App.No. P-74823 (March 1992).

A shipper's decision to limit its proprietary fleet to a size that meets its minimum needs only, does not render its support for an application nugatory. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144621, In re Gordon Trucking, Inc., App. No. E-74570 (February 1992).

Shipper need for common carrier service to supplement its proprietary fleet supports an application for authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144621, In re Gordon Trucking, Inc., App. No. E-74570 (February 1992).

A showing that a shipper has had a favorable experience with an applicant operating under temporary authority, without a showing of a need for additional service, will not support a common carrier application. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144441, In re Expedited Express, Inc., App. No. P-74573 (January 1992).

One instance of waiting two hours for a dump truck, when no efforts are made to obtain another truck sooner, does not establish need for another dump truck operator. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 144465, In re Roger Dralle d/b/a Rogers Dump Trucking, App. No. P-74586 (January 1992).

**Need for Service (cont.)**

The Commission may consider a longstanding shipping pattern in determining need for an additional carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

If an applicant is itself a shipper, evidence of the applicant's own inability to obtain transportation it requires is relevant to the issue of need for an additional common carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 143915, In re Janicki Logging Co., Inc., App. No. E-74600 (September 1991).

Need for an additional carrier may be established by evidence that certain of the shippers have not received satisfactory service from other carriers and that the shippers who already use the applicant for some service would realize considerable benefit and efficiencies from consolidated billings and requests for service from a single carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 142818, In re ABC-Legal Messengers, Inc., d/b/a Couriers - Today/Tonight, App. No. E-19876 (March 1991); recon. denied, Order M. V. No. 143215 (April 1991).

Witnesses who do not have the authority to select a common carrier or who simply favor competition do not support a grant of additional authority. RCW 81.80.070 (entry common carriers: need for service; benefits of competition). In re Roy Holman, d/b/a Early Star Trucking, App.No. P-73252 (February 1991).

Evidence that supporting shippers' transportation needs are being satisfactorily met by existing authorized carriers outweighs their testimony in support of an additional carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 141581, In re Gary Merlino Construction Co., Inc., App. No. E-19841 (June 1990).

If no carrier has existing authority, the Commission may grant an application for authority upon a showing of need for the service. If a certificate holder already exists, the Commission may grant a certificate of authority to serve the same territory only if the authorized carrier has failed or refused to furnish reasonable and adequate service. RCW 81.84.020 (entry common carriers: need for service). Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

Evidence of the intrastate shipment of goods from a warehouse within the state to points within the state, when the goods have come to rest in the warehouse after interstate shipment and are not held for a specific shipper as part of a continuous shipment, may support an application for common carrier authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 141041, In re Silver Eagle Co., App. No. E-19774 (March 1990).

Public convenience and necessity can be demonstrated through evidence that shippers' congestion would be substantially reduced, that shippers could consolidate shipments to their convenience, and that true and substantial benefits will accrue to the shipper from a grant of authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 141041, In re Silver Eagle Co., App. No. E-19774 (March 1990).

## **RCW 81.80.070**

### **Need for Service (cont.)**

Testimony that no transportation services are available to make timely delivery during peak harvest periods supports a grant of authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 141052, In re Tomas Moreno DeLeon, App. No. E-19837 (March 1990).

A shipper whose supporting testimony is based on an assumption of its customers' preference does not establish a need for combining shipments from Vancouver, B.C. with those from Blaine and Bellingham. RCW 81.90.070 (need for service). Order M. V. No. 141141, In re Vancouver Courier Services, Inc., App. No. P-72814 (March 1990).

Need for additional service may be established by testimony that shippers cannot obtain the transportation services they require, and that a shipper's expansion into a new product line has created additional traffic. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140879, In re Jim Canaday, d/b/a Canaday Farms, App. No. E-19829 (February 1990).

Competing applications for common carrier authority are not mutually exclusive; a grant of one during the pendency of the other does not preclude a grant of the second application upon a sufficient showing of need. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140746, In re Yakima Valley Disposal, Inc., App. No. P-72643 (January 1990).

Evidence that no authorized carrier hauls a commodity within the territory, and testimony from two witnesses that they would use the services proposed by the applicant, support a finding of present need for the service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140746, In re Yakima Valley Disposal, Inc., App. No. P-72643 (January 1990).

Proof of future need must necessarily be somewhat less certain than when a present need exists. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140294, In re O'Neill & Sons, Inc., App. No. E-19762 (November 1989).

A new application that is unsupported by evidence of shipper support for the grant of authority is properly dismissed. RCW 81.80.070 (entry common carriers: need for service); WAC 480-12-045. Order M. V. No. 140304, In re Joseph F. Saccomanno, d/b/a Craig Transfer & Storage Co., Inc., App. No. P-72429 (October 1989).

Evidence is relevant that tends to show that a shipper supports the applicant for reasons not related to the level of service provided by the applicant or the protestant. Former RCW 34.04.100; RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140431, In re Ell Transport, Inc., App. No. E-19683 (October 1989).

When evidence of public convenience and necessity is alleged to be substantially changed from that presented at the hearing, a new application is the proper forum for developing that evidence. Generally, reopening or rehearing under this circumstance is not appropriate. RCW 81.80.070; Former WAC 480-08-250(1). Order M. V. No. 140273, In re Thomas C. Kolean and James B. Stewart, d/b/a Olympic Transport, App. No. P-72389 (September 1989).

**Need for Service (cont.)**

When a shipper is unable to obtain a reasonable assurance from existing carriers that its transportation needs will be met, a need for an additional common carrier has been established. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).

If an applicant seeking authority to haul grape slurry establishes an unmet shipper need for the carriage of grape juice, the application will be corrected and redocketed to request authority to haul grape juice. Absent protest from carriers other than those participating in the original hearing, the application should be granted. RCW 81.80.070 (entry common carriers: need for service); WAC 480-12-045. Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).

In a common carrier application, the applicant has the burden of demonstrating need for service; protestant does not have a burden to demonstrate lack of need. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 138744, In re Rick Kamstra, d/b/a Kamstra Trucking, App. No. E-19686 (December 1988).

A protestant to an application for common carrier authority must demonstrate that it is ready, willing and able to provide the proposed service, not that it actually does provide the service. RCW 81.80.070 (entry common carriers: need for service; protestant-problems with). Order M. V. No. 138504, In re Lynn Penfold, App. No. P-71341 (October 1988).

Lack of sufficient business to support another carrier is relevant in a common carrier application only when an application demonstrates need for additional service but when the record also shows that an additional carrier would dilute the business such that neither carrier could operate profitably. RCW 81.80.070 (entry common carriers: need for service; protestants-effect on). Order M. V. No. 138504, In re Lynn Penfold, App. No. P-71341 (October 1988).

When applicant submits shipper support statements but they are not received by the administrative law judge, when the supporting shippers describe a public need that the Commission believes should not go unmet, and when no person is prejudiced thereby, the Commission will accept the statements and will grant the application. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 138300, In re Tacoma Yellow Cab Co., d/b/a Tacoma Yellow Cab Co. and Cabulance Service, App. No. E-19591 (September 1988).

The Commission, in determining need for additional common carrier service, will consider the number of separate occasions in which a shipper is unable to obtain service despite a reasonable search. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 137927, In re Gordon Trucking, Inc., App. No. E-19530 (September 1988).

## **RCW 81.80.070**

### **Need for Service (cont.)**

No demonstration of need for specialized pneumatic equipment has been made when protestants have provided satisfactory service for the shippers using diesel blowers and portable vacuum units and are willing and able to purchase electric blowers and vacuum trailers, which are readily available commercially, if the customers desire. RCW 81.80.070 (entry common carriers: need for service; specialized equipment or service). Order M. V. No. 138123, In re Food Express, Inc., App. No. P-71340 (July 1988).

When a finding of fact states the insufficiency of existing common carriage for transportation of a commodity, and the finding is supported by the record, and no apparent reason exists for denying the authority, the authority should be granted. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 19539, In re Metro Hauling, Inc., App. No. E-19539 (June 1988).

Although rates are not a proper factor in the consideration of need, the Commission may still find need when rates are a factor but when other factors, such as scheduling and service problems, are also important to supporting shippers. RCW 81.80.070 (entry common carriers: need; rates). Order M. V. No. 137626, In re Robert L. Johnson, d/b/a Postal Express, App. No. P-71118 (May 1988).

Evidence of applicant's specialized equipment is insufficient to base a grant of authority when the equipment is not shown to be unique and protestant has similar equipment available for use by the shipper. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 137791, In re William D. Dorn, d/b/a Bill Dorn Trucking, App. No. E-19500 (May 1988).

Matters relating to an applicant's nontransportation services and charges do not support a grant of common carrier authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 137392, In re Ronald H. Voight, d/b/a Voight Enterprises, App. No. P-70978 (March 1988).

Facts that do not address whether shippers have a need for additional service do not demonstrate that the public convenience and necessity require additional common carrier authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 137248, In re Jobbers Freight Service, Inc., App. No. E-19348 (February 1988).

A mechanical innovation related to transportation which reduces time and expense in certain shipping situations, which is supported by shipper testimony and which is not available from other carriers will support a grant of common carrier authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 137028, In re Redondo Heights Wrecker Service, Ltd., App. No. E-19454 (December 1987).

When broad territory is sought, an applicant need not show operations in every community or in every corner of the territory, but must show present or future need throughout the territory. RCW 81.80.070 (entry common carriers: need for service; territory). Order M. V. No. 136956, In re Jess M., Mike J., Jeff L. and Steve M. McClung, d/b/a Glacier Construction Co., App. No. P-71053 (December 1987).

**Need for Service (cont.)**

No need for additional common carrier service is shown when protestants can meet all the supporting shipper's needs and the shipper fails to demonstrate that present service is unsatisfactory. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 137103, In re Cimmaron Cedar Products, Inc., App. No. P-71019 (December 1987).

An applicant that demonstrates that it is fit, willing and able, and that the shippers of the state have need for a greater level of service, will receive common carrier permit authority unless it is found that a grant of authority would be inconsistent with the public interest. RCW 81.80.070 (entry common carriers: need for service; fitness). Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

When a supporting shipper finds the services of a protestant fully satisfactory for his needs, the supporting shipper has not shown that another carrier is required. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 136719, In re Arnold Finkbonner & Sons, Inc., App. No. E-19414 (October 1987).

Testimony that a supporting shipper "has difficulty" finding dump truck operators during the summer months, without further explanation of the difficulties or attempts to resolve them, does not alone demonstrate that shippers are not reasonably able to secure existing carriers to provide satisfactory service at the time needed. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 136719, In re Arnold Finkbonner & Sons, Inc., App. No. E-19414 (October 1987).

Applications for temporary and emergency temporary authority are handled separately from an application for continuing authority; a grant of each is based on a different demonstration of need. RCW 81.80.070 (entry common carriers: need for service); WAC 480-12-033. Order M. V. No. 136789, In re Roy N. Carlson, Inc., App. No. P-70991 (October 1987).

An applicant's possession of interstate authority may be relevant, and therefore admissible, in an application for intrastate authority when possession of the authority bears on the shipper's convenience. RCW 81.80.070 (entry common carriers: need for service); Former WAC 480-08-190. Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).

Factors that are unrelated to transportation, such as where the supporting shippers learned about the application, do not bear on the need for an additional carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).

In determining a common carrier application, the Commission will weigh all the evidence regarding a shipper's ability to secure service, and will not restrict its review to protestants' ability to serve. RCW 81.80.070 (entry common carriers: need for service; protestants-problems with). Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).



## **RCW 81.80.070**

### **Need for Service (cont.)**

Credible evidence that it is difficult to obtain common carriage because no carrier has authority to serve, supports a grant of additional common carriage. RCW 81.80.070 (entry common carriers: need for service for service). Order M. V. No. 136135, In re Sorenson Transportation Co., Inc., App. No. P-69680 (July 1987).

A finding that the transportation facilities of the state will be harmed by a grant of authority must be supported by substantial evidence of record. When an applicant has made a prima facie showing of need for additional common carrier service, a denial of authority predicated on public interest grounds should be supported by specific findings of how the addition of another carrier will harm the transportation facilities of the state. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 136191, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (July 1987).

A basic test for common carrier authority is a demonstration of need for service. When the evidence shows late deliveries, slow service and lack of package delivery service, need for an additional package delivery authority has been shown. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 136191, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (July 1987).

When an applicant fails to make a prima facie case that another carrier is needed and fails to demonstrate that it is fit to conduct operations, a finding of improper action by a protestant has no bearing upon the outcome of the proceeding. RCW 81.80.070 (entry common carriers: fitness; need for service; protestants-problems with). Order M. V. No. 135885, In re Ronald W. Shane, d/b/a Shane's Excavating, App. No. P-70559 (May 1987).

The test for a grant of common carrier authority is whether the shipping public's convenience and necessity require the service, not whether the applying carrier would be benefitted. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 135702, In re Cartin Delivery Service, Inc., App. No. E-19099 (April 1987).

The number of shipper witnesses supporting an application for extension of authority is irrelevant if there is no demonstration of need for such service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 135702, In re Cartin Delivery Service, Inc., App. No. E-19099 (April 1987).

The legislature has authorized the Commission to grant authority only when there is a demonstrated need for service. A contention that the applicant would have better opportunities if it were allowed to exercise its "right" to pursue business where it wants to, does not demonstrate need for service. RCW 81.80.070; Former WAC 480-08-230(4). Order M. V. No. 134777, In re Eliza & Tarrell Harrison, d/b/a ET & T Trucking, App. No. P-70219 (September 1986).

**Need for Service (cont.)**

Competitive advantage in an unregulated activity does not support a grant of authority; permit authority will be granted only upon a showing that the proposed service is required by the public convenience and necessity. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 133838, In re Inland Empire Distribution Systems, Inc., App. No. P-69280 (April 1986).

The Commission will grant additional common carrier authority only if there is a showing that another carrier is needed. Credible evidence that a protestant has equipment ready for the shipper and that it will station equipment nearby upon request, and that it is ready, willing, and able to perform the service, supports a proposed finding that a protesting carrier stands ready to provide service to the shipper. Need for an additional carrier is not shown. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 133660, In re Washington Trucking, Inc., App. No. E-19174 (March 1986).

An applicant whose former permit was cancelled, who now applies for authority in his old territory, must show evidence of need for a carrier. A demonstration of the conditions for reissuance of a cancelled permit, does not demonstrate that the public convenience and necessity require additional authority. RCW 81.80.070 (entry common carriers: need for service); WAC 480-12-065. Order M. V. No. 133363, In re Seafair Moving & Transfer, Inc., App. No. P-69394 (February 1986).

A supporting shipper who has been unable to find carriers of bulk lime to perform on a timely basis, has stated need for an additional common carrier with authority to transport bulk lime. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 133434, In re William Archambeau d/b/a Bill Archambeau, App. No. E-19143 (February 1986).

When supporting shippers indicate a need for timely transportation of their commodities and have been unable to secure consistent service from the protestant, and the protestant admits that it can't serve all the needs of the shippers, the applicant has shown the need for an additional carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 133382, In re Sartin Construction and Trucking, Inc., App. No. E-19106 (January 1986).

Supporting shippers who have used the protestant's services, but can give no reason why the protestant's services are no longer satisfactory, have not shown that another carrier is required. RCW 81.80.070 (entry common carriers: need for service; search for service). Order M. V. No. 131975, In re Thomas K. Munro, App. No. E-19065 (June 1985).

When authority is denied in part because the evidence presented was of limited scope, the subsequent disposition of the protestant's equipment does not provide a basis for an applicant's exception. The Commission grants authority based on a show of need for transportation services. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 131564, In re Ziegler & Schwyhart Transportation, Inc., App. No. P-68604 (March 1985).

## **RCW 81.80.070**

### **Need for Service (cont.)**

The Commission may take note that the protestants improved service after the application filed its application. While the Commission will not judge the need for an additional carrier on the basis of the applicant's service while it possesses temporary authority, the improved efforts by the protestants may reflect that prior to the application a higher level of service was needed, supporting a grant of authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 131310, In re United Truck Lines, Inc., App. No. E-18895 (January 1985).

An inability to secure satisfactory service from existing carriers supports a grant of authority. When shippers have in the past received satisfactory service but now find it increasingly difficult to find timely, complete handling of delicate goods, a need for an additional common carriage has been shown. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 131310, In re United Truck Lines, Inc., App. No. E-18895 (January 1985).

An applicant must present evidence of local cartage need before the Commission will grant local cartage authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 131210, In re Signal Electric, Inc., App. No. P-68373 (January 1985).

When existing carriers are answering the needs of a slowly growing market, no need for another carrier is shown. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 130721, In re Crosby & Overton, Inc., App. No. P-66968 (October 1984).

The fact that existing carriers would not be harmed by a grant of authority is not a proper foundation upon which a grant may be based. The standard of public convenience and necessity requires that the decision whether to grant authority be based on the public need for another carrier. RCW 81.80.070 (entry common carriers: burden of proof; need for service). Order M. V. No. 130148, In re Common Carriers, Inc., App. No. E-18729 (August 1984).

It is the Commission's policy to grant authority to the fullest extent of demonstrated public need. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 130148, In re Common Carriers, Inc., App. No. E-18729 (August 1984).

Incidents occurring ten years before the hearing do not demonstrate a current or future need for service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 129839, In re N. Joseph & Robert Paduano d/b/a Juanita Heavy Hauling, App. No. E-18912 (June 1984).

If the supporting shippers say they have no need for service wholly within the city limits of Tacoma, their testimony does not support a grant of local cartage authority. RCW 81.80.070 (entry common carriers: need for service); WAC 480-12-990(e). Order M. V. No. 129800, In re Fort Lewis Taxi #7, App. No. P-66877 (June 1984).

The Commission may grant an application for authority upon a showing that existing service does not satisfy the needs of supporting shippers. The Commission's function is not the preservation of monopoly. RCW 81.80.070 (entry common carriers: need). Order M. V. No. 129635, In re Susan Schlosser and Peggy Blake d/b/a The Paper Jogger, App. No. P-67065 (May 1984).

**Need for Service (cont.)**

When the supporting shippers have never contacted available carriers to seek service, and when protestants have an ability to provide the service, no need for an additional carrier is shown. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 129710, In re T & T Milk Transport, Inc., App. No. E-18817 (May 1984).

Evidence of a supporting shipper that his jobs are short term and unattractive to existing carriers in busy seasons, and that he therefore experiences difficulty in obtaining dump trucks, demonstrates need for additional dump truck authority. RCW 81.80.070 (entry common carriers: need for service; protestants-problems with). Order M. V. No. 127491, In re Thomas M. Stevenson d/b/a Thomas M. Stevenson Trucking, App. No. E-18728 (April 1984).

Shipper testimony that shows that it has no immediate need for another carrier and that current carriers are satisfactory, does not demonstrate a need for another carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 129479, In re Carl Oscar Lundell d/b/a Lundell Trucking, App. No. E-18894 (April 1984).

The Commission will grant additional common carrier authority, even though existing service is "adequate", if the applicant can demonstrate that the existing service is not sufficient to meet the shipper's reasonable needs. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 129581, In re G & L Transport, Inc., App. No. P-67188 (April 1984).

Although the Commission may grant authority where "adequate" service already exists, it will do so only if the existing service is not "sufficient" to meet shippers' needs. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 129593, In re Richard T. Kassuhn d/b/a R&R Trucking, App. No. P-67498 (April 1984).

The testimony of a supporting witness that he could not secure carriers of heavy machinery on specialized equipment during the peak season, does not demonstrate need for additional authority when the witness also testified that he refuses to deal with some carriers--even in periods of acute need--and will not explain why he will not deal with them. RCW 81.80.070 (entry common carriers: need for service; preference). Order M. V. No. 129470, In re The Nestaval Corporation, App. No. P-67706 (April 1984).

A written statement that a shipper has logs to ship from various portions of the state, but which does not specify which counties nor state a need for additional carriers, is insufficient to support an application. RCW 81.80.070 (entry common carriers: need for service); WAC 480-12-045. Order M. V. No. 129687, In re Allen Brown d/b/a Allen Brown Woodwaste, App. No. P-67126 (October 1983).

Statements by a supporting shipper that do not indicate any current or anticipated future difficulty in obtaining transportation, do not indicate need for additional common carriage. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 128671, In re Loren Bowen d/b/a Twalmica Trucking, App. No. P-67223 (October 1983).

## **RCW 81.80.070**

### **Need for Service (cont.)**

Prior operation without violation, under a now-transferred permit, shows the applicant's ability to operate in compliance with the law; it does not show a need for an additional carrier in applicant's former territory. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 128115, In re Kenneth D. Peterson, d/b/a Ken D. Peterson Trucking, App. No. P-67040 (September 1983).

A finding--that a region's economy will continue to improve, that the improvement will require more carriers of logs, and that carriers are needed on short notice and are difficult to obtain--if supported by the evidence, will be affirmed and will support a grant of authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 128299, In re Larry J. Manke, App. No. P-67088 (September 1983).

A shipper's need for short haul grain trucks, based on changing shipping conditions, plus short-notice requirements for equipment, is sufficient to support an application for additional common carrier service authority. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 128026, In re Frank E. Nonnemacher d/b/a Nonnemacher Farms, App. No. P-66910 (July 1983).

Substantial evidence that the lack of "on call" emergency courier service, provided by trained personnel having an understanding of medical and hospital needs, led shippers to use their own inferior service demonstrates a public need for such service. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 127558, In re Jon S. Pansie d/b/a Tri-Pan Services, Inc., App. No. P-65704 (May 1983).

Substantial evidence, found credible, demonstrating an inability to obtain service when needed, supports a grant of authority for another carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 127249, In re Albert P. Ulrich, App. No. E-18668 (April 1983).

When timely, knowledgeable service is critical; when three supporting shippers have had difficulty obtaining such service in the past; and when the protestant does not meet the service level required by the shippers, additional authority will be granted. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 127250, In re Legal Messengers, Inc., App. No. E-18687 (March 1983).

When the supporting shippers acknowledge that other carriers had previously serviced and could still carry the traffic, their testimony fails to demonstrate a need for another carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 127129, In re Don Mumma Trucking, Inc., App. No. E-18665 (February 1983).

Producers of fruit slurries, who anticipate a future increase in production, but offer no specific facts showing that current service is unsatisfactory or that an existing carrier would not be able to handle the future need, have not demonstrated that public convenience and necessity require the applicant's services. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 126825, In re Lynden Transport, Inc. d/b/a Milky Way, Inc., App. No. E-18534 (January 1983).

**Need for Service (cont.)**

A mere statement that a shipper "has difficulty obtaining transportation and if the application is denied the difficulty will continue" does not demonstrate that existing carriers are unable to provide satisfactory service when it is needed. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 126431, In re Tacoma Hauling Co., Inc., App. No. E-18498 (October 1982).

A history of service may be a relevant factor in assessing need when the commodity hauled is subject to a volatile and changing market. If the applicant has traditionally hauled certain commodities under a garbage certificate but market conditions now sometimes give some of those commodities value, the Commission may issue common carrier authority upon application and a showing of need. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 126442, In re United Drain Oil Service, Inc., App. No. P-65787 (October 1982)

The transportation of boats from yard, to access points, to a launch site, combined with a lack of alternative available carrier service, demonstrates need for an additional carrier. RCW 81.80.070 (entry common carriers: need for service). Order M. V. No. 125960, In Peninsula Yacht Moving, Inc., App. No. E-18581 (August 1982).

**Entry Common Carriers: Preference**

**Appellate decision.** When the entire record, considered as a whole, demonstrates that shippers' support of an application was based on a preference--either for applicant's driver, for a small carrier generally, or simply for an additional carrier--and applicant has failed to show the required services cannot be provided by existing carriers, then the Commission's decision denying authority was not clearly erroneous. Former RCW 34.04.130(5) and (6); RCW 81.80.070 (entry common carriers: preference). Sun Transportation Co., Inc. v. The Utilities and Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

Mere preference by the shipper for the services of a particular carrier is not sufficient to support a grant of authority. RCW 81.80.070 (entry common carriers: preference).

Order M. V. No. 148321, In re Christopher Eric Pease, d/b/a Japanese American Mutual, App. No. P-77630 (November 1994).

Order M. V. No. 145984, In re Larry Honn & Son, App. No. P-75586 (January 1993).

Order M. V. No. 145450, In re Steven O. Sauer, d/b/a Steve Sauer Trucking, App. No. P-75523 (August 1992).

Order M. V. No. 144441, In re Expedited Express, Inc., App. No. P-74573 (January 1992).  
Sun Transportation Co., Inc. v. The Utilities and Transportation Commission, unpublished opinion noted at 54 Wn.App. 1018 (1989).

Order M. V. No. 126084, In re Tacoma Hauling, Inc., App. No. E-18498 (August 1984).

## **RCW 81.80.070**

### **Preference (cont.)**

A preference for an applicant based on favorable experiences, without showing inability to obtain reasonable service from existing carriers, is not sufficient to support an application. RCW 81.80.070 (entry common carriers: preference).

Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

Order M. V. No. 143097, In re Robert A. Hurley, d/b/a AAA Northwest Towing, App. No. E-20003 (April 1991).

Order M. V. No. 137819, In re Craig J. Elliott, d/b/a TLC Moving & Storage, App. No. E-19421 (June 1988).

Order M. V. No. 135506, In re Zeb F. Johnson d/b/a All West Auto Transport, App. No. P-69380 (March 1987).

Order M. V. No. 128115, In re Kenneth D. Peterson, d/b/a Ken D. Peterson Trucking, App. No. P-67040 (September 1983).

If a shipper has made a reasonable but unsuccessful effort to find existing carriers to meet its shipping requirements prior to supporting the application of another carrier, its support does not constitute a mere preference. RCW 81.80.070 (entry common carriers: preference).

Order M. V. No. 148344, In re Gloria & Roosevelt Randall d/b/a Gloria Jeane Hauling, App. No. P-77650 (December 1994).

Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).

Order M. V. No. 146148, In re Saber Azizi, d/b/a Fast Courier & Assoc., App. No. E-76066 (February 1993).

A supporting shipper who was using a common carrier but found its service unsatisfactory, who made no effort to find alternative common carriage when applicant became available, has stated a mere preference for the applicant. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 146819, In re Ram Singh, d/b/a Singh Delivery Service, App. No. P-76040 (July 1993).

A shipper's desire to continue using the applicant because the shipper has developed a rapport with the applicant during a period of unauthorized service does not demonstrate need for applicant's services. RCW 81.80.070 (entry common carriers: need for service; preference). Order M. V. No. 144465, In re Roger Dralle d/b/a Rogers Dump Trucking, App. No. P-74586 (January 1992).

A shipper's preference for an applicant, coupled with the shipper's failure to seek service from existing carriers, do not support an application for common carrier authority. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 139673, In re Benito Medelez, Jr., d/b/a Medelez Trucking, App. No. E-19789 (November 1989).

**Preference (cont.)**

When transportation was obtained by shippers on all but two occasions in the two years prior to the hearing, either from the applicant, the protestants, or another carrier, the testimony in support of the application demonstrates a preference for the applicant--not a need; preference is insufficient to support an application for authority. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 139688, In re Elmer Cook Trucking, Inc., App. No. E-19682 (June 1989).

Shippers who have not inquired of existing common carriers may demonstrate only a preference for an applicant. Preference for an applicant will not support a grant of common carrier authority. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 139284, In re Tom Dyksterhuis, d/b/a Valley Molasses Co., App. No. P-71984 (March 1989).

When a shipper desires applicant's services because of applicant's abilities to fill in as a construction worker, as an operator or as a laborer when applicant's truck is not needed, the shipper has shown a preference and not a need for applicant's services. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 138744, In re Rick Kamstra, d/b/a Kamstra Trucking, App. No. E-19686 (December 1988).

Preference will not support a grant of motor carrier authority. Support for an applicant based upon protestant's rates, upon the protestant's failure to respond to calls for service three years previously, and upon the fact that protestant serves a competitor of the shipper, states a mere preference for the applicant, not a need for additional service. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 132952, In re Brett & Son, Inc., App. No. E-19072 (November 1985).

When protestants demonstrate an ability to provide all the transportation needs of the supporting shippers, and the shippers indicate that they would use the applicant because of long acquaintance or because the applicant will perform non-transportation related services, the supporting shippers have stated only a preference for the applicant. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 132784, In re George A. Niemela, App. No. P-69133 (November 1985).

When a supporting shipper would prefer to give his business to the applicant because the applicant is a customer and a small business, but the shipper has had 15 years of satisfactory service from the protestant, need for an additional carrier is not shown. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 131224, In re Earl Moritz, App. No. P-68253 (January 1985).

When supporting shippers fail to demonstrate that present service is unsatisfactory, or that their desire for the applicant is more than a statement of preference, no need for an additional carrier is shown under the standards of Black Ball Freight v. WUTC, 74 Wn.2d. 871, 447 P.2d. 597 (1968). RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 130148, In re Common Carriers, Inc., App. No. E-18729 (August 1984).



## **RCW 81.80.070**

### **Preference (cont.)**

An application predicated on current, apparently unauthorized service to a supporting shipper, whose firm prefers the applicant but could use existing common carriers should the applicant be denied authority, has not demonstrated a need for an additional common carrier. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 129636, In re Stuart B. Lervick d/b/a Stuart B. Lervick Company, App. No. P-67239 (May 1984).

The testimony of a supporting witness that he could not secure carriers of heavy machinery on specialized equipment during the peak season, does not demonstrate need for additional authority when the witness also testified that he refuses to deal with some carriers--even in periods of acute need--and will not explain why he will not deal with them. RCW 81.80.070 (entry common carriers: need for service; preference). Order M. V. No. 129470, In re The Nestaval Corporation, App. No. P-67706 (April 1984).

Testimony from a supporting shipper, stating that he prefers to work with crews he knows, states a preference for applicant and not a need for an additional carrier. Preference does not demonstrate need for additional common carrier authority. RCW 81.80.070 (entry common carriers: preference). Order M. V. No. 127491, In re Thomas M. Stevenson d/b/a Thomas M. Stevenson Trucking, App. No. E-18728 (April 1983).

### **Entry Common Carriers: Protestants, Effect On**

The effect of a grant of authority must be measured by objective evidence. Non-specific allegations of a general deterioration in the market will not support a finding that a grant of authority will harm the protestants. RCW 81.80.070 (entry common carriers: protestants-effect on). Order M. V. No. 139493, In re Jim Elsbree, d/b/a J & P Trucking, App. No. P-71880 (May 1989).

Lack of sufficient business to support another carrier is relevant in a common carrier application only when an application demonstrates need for additional service but when the record also shows that an additional carrier would dilute the business such that neither carrier could operate profitably. RCW 81.80.070 (entry common carriers: need for service; protestants-effect on). Order M. V. No. 138504, In re Lynn Penfold, App. No. P-71341 (October 1988).

A proposed order's failure to find that the protestant would not be adversely affected by a grant of authority is immaterial when the applicant has not demonstrated that an additional carrier is required. RCW 81.80.070 (entry common carriers: burden of proof; protestants-effect on). Order M. V. No. 133660, In re Washington Trucking, Inc., App. No. E-19174 (March 1986).

The fact that existing carriers would not be harmed by a grant of authority is not a proper foundation upon which a grant may be based. The standard of public convenience and necessity requires that the decision whether to grant authority be based on the public need for another carrier. RCW 81.80.070 (entry common carriers: burden of proof; protestants-effect on). Order M. V. No. 130148, In re Common Carriers, Inc., App. No. E-18729 (August 1984).

**Protestants, Effect On (cont.)**

Revenue loss to a protesting carrier, alone, is not a sufficient reason for the Commission to deny an application. RCW 81.80.070 (entry common carriers: protestants-effect on). Order M. V. No. 129593, In re Richard T. Kassuhn, App. No. P-67498 (April 1984).

The Commission's function is to match shippers' needs with a stable transportation industry, not to guarantee carrier revenues. The protestant's unsupported statement that a grant of authority could only result in a loss of revenue for the protestant, presents no basis for the Commission to deny authority to the applicant. RCW 81.80.070 (entry common carriers: protestants-effect on). Order M. V. No. 126351, In re Bill N. Sheely, App. No. E-18621 (September 1982).

**Entry Common Carriers: Protestants - Obligation to Make Self Known**

Existing carriers who protest an application by an applicant who seeks to serve a community that is not fluent in English must demonstrate that they have made reasonable efforts to become known in and to serve that market. RCW 81.80.070 (entry common carriers: protestants -- obligation to make self known; search for service). Order M. V. No. 148596, In re Son M. Pae, d/b/a Western Moving Co., App. No. E-78164 (June 1995).

A protestant does not have the burden of personally soliciting every existing shipper, but must demonstrate that it made reasonable efforts to be discoverable in the territory of the application. RCW 81.80.070 (protestants-solicitation burden). Order M. V. No. 140879, In re Jim Canaday, d/b/a Canaday Farms, App. No. E-19829 (February 1990).

When protestant to an application for dump truck authority has neither solicited nor engaged in the kind of business needed by the shipper, a finding that its readiness, willingness and ability to provide the service is not established, is supported by the evidence. RCW 81.80.070 (entry common carriers: protestants-solicitation burden). Order M. V. No. 136997, In re Mark A. Carpenter, d/b/a Mark A. Carpenter Trucking, App. No. E-19480 (December 1987).

Protesting carriers can demonstrate holding out and availability by advertising in media reasonably calculated to reach shippers or by other means appropriate to the business sought. RCW 81.80.070 (entry common carriers: protestants-solicitation burden). Order M. V. No. 135702, In re Cartin Delivery Service, Inc., App. No. E-19099 (April 1987).

A protesting carrier does not have the burden of personally soliciting every existing shipper, but rather must demonstrate only that it held itself out to conduct operations in the territory of the application. RCW 81.80.070 (entry common carriers: protestants-solicitation burden). Order M. V. No. 135702, In re Cartin Delivery Service, Inc., App. No. E-19099 (April 1987).

If shippers have no reasonable access to knowledge that a carrier is serving an area then their needs cannot be met by the carrier. When a protestant has only one phone book advertisement for its service in a nine-county area, and no marketing staff, the information that the carrier stands ready to serve is not reasonably available to shippers. RCW 81.80.070 (entry common carriers: protestants-solicitation burden). Order M. V. No. 133107, In re Mail Dispatch, Inc. d/b/a M.D.I., App. No. E-18928 (December 1985).

## **RCW 81.80.070**

### **Entry Common Carriers: Protestants - Problems With**

When the protestants have not kept abreast of technological developments that might improve service to the public and have not taken the initiative in seeking and finding ways to improve and offer the highest quality service, do not advertise their availability for the specialized service of moving pianos, and their staffs apparently provide quotes for three-person moves when their policies would indicate two persons to be sufficient, they have not demonstrated that they are ready, willing and able to provide the specialized service the applicant proposes. RCW 81.80.070 (entry common carriers: protestants -- problems with). Order M. V. No. 148807, In re Thurston, Richard d/b/a Kratos Transport, App. No. E-78363 (April 1996).

The fitness of the protestant is not an issue in an application for new authority unless it bears on the level of service available to the public. RCW 81.80.070 (entry common carriers: protestants-problems with). Order M. V. No. 147418, In re Charles E. & Susie P. Wirth, d/b/a Transport Northwest, App. No. P-76762 (February 1994).

A protestant to an application for common carrier authority must demonstrate that it is ready, willing and able to provide the proposed service, not that it actually does provide the service. RCW 81.80.070 (entry common carriers: need for service; protestants-problems with). Order M. V. No. 138504, In re Lynn Penfold, App. No. P-71341 (October 1988).

In determining a common carrier application, the Commission will weigh all the evidence regarding a shipper's ability to secure service, and will not restrict its review to protestants' ability to serve. RCW 81.80.070 (entry common carriers: need for service; protestants-problems with). Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).

When an applicant fails to make a prima facie case that another carrier is needed and fails to demonstrate that it is fit to conduct operations, a finding of improper action by a protestant has no bearing upon the outcome of the proceeding. RCW 81.80.070 (entry common carriers: fitness; need for service; protestants-problems with). Order M. V. No. 135885, In re Ronald W. Shane, d/b/a Shane's Excavating, App. No. P-70559 (May 1987).

When the sole protestant to a portion of an application is subject to a proceeding to suspend the protestant's permit, and the protestant has failed to respond to inquiries for service, the applicant has shown a need for additional authority in the territory served by the protestant. RCW 81.80.070 (entry common carriers: protestants-problems with). Order M. V. No. 129710, In re T & T Milk Transport, Inc., App. No. E-18817 (May 1984).

A protestant's fitness is not at issue in a proceeding for a common carrier permit unless it affects the protestant's ability to provide reasonable and safe transportation. RCW 81.80.070 (entry common carriers: protestants-problems with). Order M. V. No. 129479, In re Carl Oscar Lundell d/b/a Lundell Trucking, App. No. E-18894 (April 1984).

Evidence of a supporting shipper that his jobs are short term and unattractive to existing carriers in busy seasons, and that he therefore experiences difficulty in obtaining dump trucks, demonstrates need for additional dump truck authority. RCW 81.80.070 (entry common carriers: need for service; protestants-problems with). Order M. V. No. 127491, In re Thomas M. Stevenson d/b/a Thomas M. Stevenson Trucking, App. No. E-18728 (April 1984).

### **Protestants - Problems With (cont.)**

Testimony of a supporting shipper that trucking in his area was virtually impossible to find at the time of hearing, and that the protestant was unable to provide the necessary service, supports a grant of authority. RCW 81.80.070 (entry common carriers: protestants-problems with). Order M. V. No. 129316, In re Fred Dollar d/b/a Fred Dollar Trucking, App. No. P-67243 (March 1984).

A supporting shipper's evidence that showed difficulty in obtaining service so that on one occasion the shipper was so desperate that he asked the Commission how to obtain service, supports a grant of authority. RCW 81.80.070 (entry common carriers: protestants-problems with). Order M. V. No. 127397, In re Ray Gimlin d/b/a Beaver Falls Trucking, App. No. E-18697 (April 1983).

If an existing carrier is unable to provide service that a reasonable person would consider satisfactory, so that a reasonable carrier would have reservations about utilizing the carrier, this could be a substantial factor in demonstrating a need for an additional carrier. This would not be the case when isolated instances of service failure are shown, because no carrier can be expected to provide absolutely perfect service in 100% of all instances. RCW 81.80.070. Order M. V. No. 126825, In re Lynden Transport, Inc., d/b/a Milky Way, Inc., App. No. E-18534 (January 1983).

A protestant must show that it is ready, willing and able to handle the supporting shippers' needs--including a demonstration of authority, equipment, skill, and desire to fulfill shippers' needs--and that it has actively pursued business in the community of the shipper. RCW 81.80.070 (entry common carriers: protestant-problems with); WAC 480-12-045(3)(e). Order M. V. No. 126429, In re Glenn Mar, Inc., App. No. P-65982 (November 1982).

A shipper who requires prompt delivery of perishable produce for storage, and has experienced delays in the past because of a shortage of available carriers, shows the need for an additional carrier. The RCW 81.80.070 (entry common carriers: protestants-problems with). Order M. V. No. 126351, In re Bill N. Sheely, App. No. E-18621 (September 1982).

Showing need for transportation of boats from a hard-to-access point within Port Angeles to a launch site within the city, and a lack of alternative available service, demonstrates need for an additional carrier. RCW 81.80.070 (entry common carriers: protestants-problems with); WAC 480-12-990(E). Order M. V. No. 125960, In re Peninsula Yacht Moving, Inc., App. No. E-18581 (August 1982).

The burden is on an applicant to prove need for additional authority, not on the protestants to disprove need, and when the applicant fails to make a prima facie showing that another carrier is needed, the protestants' inability to serve all the needs of the shippers has no bearing on the outcome. RCW 81.80.070 (entry common carriers: need for service; protestants: problems with). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

### **Entry Common Carriers: Public Convenience**

Waiver of WAC 480-12-085 will be granted if the applicant establishes that it will operate as a common carrier a majority of the time and will not limit its service to the public in favor of serving its own transportation needs. RCW 81.80.070 (common carriers: public convenience); WAC 480-12-085. Order M. V. No. 143235, In re Emery & Clements, Inc., App. No. E-20049 (May 1991).

## **RCW 81.80.070**

### **Entry Common Carriers: Rates**

Although rates are usually not a proper factor in the consideration of need for service, rates can support a grant of authority when existing rate levels result in an effective ban on carrier service. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

Rates are not a proper factor in the consideration of need for service, absent special circumstances. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 145268, In re Becker Trucking, Inc., App. No. E-74675 (July 1992).

Rates can support a grant of authority when existing rate levels result in an effective ban on carrier service. RCW 81.80.070 (entry common carriers: rates; need for service). Order M. V. No. 143056, In re D & D ICS Group, Inc., d/b/a Insurance Courier Services, App. No. P-73119 (April 1991); recon. denied, Order M. V. No. 143513 (July 1991).

Absent a showing of unusual circumstances, lower rates are not a valid reason for a grant of authority. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

The Commission will not consider level of rates in an application absent some unusual and overriding circumstance, for example, that the rate level for service in a territory is so high that it makes service economically prohibitive. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 138234, In re Inter-run, Inc., d/b/a Inter-run, App. No. P-71544 (August 1988).

Rates generally are not a proper factor in consideration of need, but may be considered together with other factors, such as scheduling and service problems, when those factors are considered to be important by supporting shippers. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 137626, In re Robert L. Johnson, d/b/a Postal Express, App. No. P-71118 (May 1988).

Rates are not a proper factor in consideration of need, absent special circumstances. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 136719, In re Arnold Finkbonner & Sons, Inc., App. No. E-19414 (October 1987).

A supporting shipper's testimony that after a 15-year history of shipping with the protestant, the shipper changed to the applicant--based on the offer of a lower rate, when the shipper did not discuss a possible change in rate with the protestant--fails to support a need for another carrier. Rates alone are not a basis for a grant of authority. RCW 81.80.070 (entry common carriers: rates). Order M. V. No. 129935, In re Geer Brothers Trucking, Inc., App. No. P-67291 (July 1984).

**Entry Common Carriers: Restrictions in Permit (Commission Imposition Of)**

The Commission generally will not impose restrictions in a permit unless there is a strong showing that they are required. RCW 81.80.070 (entry common carriers: restrictions in permit). Order M. V. No. 147067, In re Barry Swanson Trucking, Inc., App. No. E-76555 (October 1993).

Restrictive language will not be imposed in a permit unless there is a strong showing that it is required. RCW 81.80.070 (restrictions in permit). Order M. V. No. 139639, In re Robert Earl Overby, d/b/a R.E.O. Delivery Service, App. No. P-72188 (June 1989).

Restrictions in permits are disfavored. When there is evidence that a 75-pound per parcel restriction is inconvenient and causes shipping problems and the restriction is not based on a shipping need or pattern, a grant of an application for increase to 100 pounds in the allowed weight is appropriate. RCW 81.80.070 (restrictions in permit). Order M. V. No. 135702, In re Cartin Delivery Service, Inc., App. No. E-19099 (April 1987).

When a large number of shippers require transportation of large aggregate shipments over the carrier's 100-lb. weight restriction, and are unable to secure the transportation in a timely manner, removal of the weight restriction is proper. Generally, weight restrictions should not be imposed without a showing that they are required. RCW 81.80.070 (entry common carriers: restrictions). Order M. V. No. 128995, In re United Parcel Service, Inc., App. No. E-18527 (January 1984).

**Entry Common Carriers: Search for Service**

**Appellate decision.** Although the Commission places considerable weight upon evidence that an applicant's supporting shippers have failed to ask existing carriers whether they can provide the needed services, it does not necessarily follow that that fact alone compels the Commission to deny an application. RCW 81.80.070 (entry common carriers: search for service). Oregon Freightways, et al., v. WUTC and Silver Eagle Company, Cause No. 28779-6-I, Court of Appeals, Division One (August 1992)(**Unpublished Opinion**); affirming Order M. V. No. 141041, In re Silver Eagle Company, App. No. E-19774 (March 1990).

Need for service is shown by credible evidence that shippers cannot obtain the transportation they require from existing carriers, despite their reasonable efforts to do so. RCW 81.80.070 (entry common carriers: need for service; search for service).

Order M. V. No. 143662, In re T.W.G. Transport Ltd., App. No. P-74129 (July 1991);  
 Order M. V. No. 144441, In re Expedited Express, Inc., App. No. P-74573 (January 1992).  
 Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).  
 Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).  
 Order M. V. No. 136348, In re Jobbers Freight Service, Inc., App. No. E-19348 (August 1987).  
 Order M. V. No. 126429, In re Glenn Mar, Inc., App. No. P-65982 (November 1982).

## **RCW 81.80.070**

### **Search for Service (cont.)**

A shipper who has not made a reasonable effort to find common carriers to serve its shipping requirements has not shown a need for additional common carrier authority. RCW 81.80.070 (entry common carriers: search for service).

Order M. V. No. 146819, In re Ram Singh, d/b/a Singh Delivery Service, App. No. P-76040 (July 1993).

Order M. V. No. 138131, In re Punctual Transportation, Inc., App. No. P-71023 (August 1988).

Supporting shippers ordinarily must make a reasonable search, but not necessarily an exhaustive search, for available existing carriers to meet their shipping requirements, in order to demonstrate need for an additional common carrier. RCW 81.80.070 (entry common carriers: search for service).

Order M. V. No. 148367, In re Redline Courier, Inc., App. No. P-77664 (December 1994).

Order M. V. No. 145708, In re ENA Couriers (Seattle), Inc., App. No. E-75722 (October 1992).

Order M. V. No. 143915, In re Janicki Logging Co., App. No. E-74600 (September 1991).

Generally, a shipper who has made no effort to obtain transportation service from existing carriers has not demonstrated need for an additional common carrier. RCW 81.80.070 (entry common carriers: search for service).

Order M. V. No. 147257, In re Bar-Nunn, Inc., App. No. P-76693 (December 1993).

Order M. V. No. 144441, In re Expedited Express, Inc., App. No. P-74573 (January 1992).

Order M. V. No. 137090, In re Midland Transportation, Inc., App. No. E-19471 (December 1987).

Order M. V. No. 136013, In re Bragg Investment Co., Inc., d/b/a J.B.A Co., App. No. P-70468 (May 1987).

Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

Order M. V. No. 125960, In re Peninsula Yacht Moving, Inc., App. No. E-18581 (August 1982).

An application for authority may be granted when a shipper conducts a reasonable, unsuccessful search for service even though a protestant made reasonable efforts to make itself known. RCW 81.80.070 (entry common carriers: search for service).

Order M. V. No. 144621, In re Gordon Trucking, Inc., App. No. E-74570 (February 1992).

Order M. V. No. 127248, In re Jesse C. Bridges, App. No. P-66647 (March 1983).

Order M. V. No. 129068, In re John F. Mitchell, App. No. P-67157 (January 1984).

Existing carriers who protest an application by an applicant who seeks to serve a community that is not fluent in English must demonstrate that they have made reasonable efforts to become known in and to serve that market. RCW 81.80.070 (entry common carriers: protestants -- obligation to make self known; search for service). Order M. V. No. 148596, In re Son M. Pae, d/b/a Western Moving Co., App. No. E-78164 (June 1995).

**Search for Service (cont.)**

When a shipper has made reasonable but unsuccessful efforts to meet its transportation requirements with existing carriers prior to supporting the application of an alternative carrier, the shipper's support is not based on a mere preference. RCW 81.80.070 (entry common carriers: search for service; preference). Order M. V. No. 148344, In re Gloria & Roosevelt Randall d/b/a Gloria Jeane Hauling, App. No. P-77650 (December 1994).

The testimony of a supporting shipper who does not have knowledge of the extent of his company's search for available carriers is entitled to little weight. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 148367, In re Redline Courier, Inc., App. No. P-77664 (December 1994).

A shipper is not unreasonable in declining to pursue a fruitless effort to find an available carrier to meet its requirements. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 148334, In re Frank Alfred & Lee L. Chandler, d/b/a C & C Logging Company, App. No. E-77568 (November 1994).

The reasonableness of a shipper's efforts to find available carriers depends on the circumstances of the shipper's operations. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 148334, In re Frank Alfred & Lee L. Chandler, d/b/a C & C Logging Company, App. No. E-77568 (November 1994).

When supporting shippers have met their transportation requirements with their own employees and have never investigated the availability of other carriers, and a protestant provides the service in the area where the supporting shippers might need service, need for an additional carrier is not shown. RCW 81.80.070 (entry common carriers: need for service; search for service). Order M. V. No. 148321, In re Christopher Eric Pease, d/b/a Japanese American Mutual, App. No. P-77630 (November 1994).

When the supporting shippers have made little effort to find carriers to provide the transportation they require, and the protestants reasonably advertise and are available to provide the desired service, need for an additional carrier is not shown. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 147418, In re Charles E. & Susie P. Wirth, d/b/a Transport Northwest, App. No. P-76762 (February 1994).

The requirement that shippers have made a reasonable effort to obtain service from existing carriers in order to demonstrate a need for an additional carrier generally does not include a requirement that the shippers have explored with the carriers they contacted those carriers' possible future availability for service. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).



## **RCW 81.80.070**

### **Search for Service (cont.)**

Whether the protestant would have been discovered had the supporting shipper made reasonable efforts to find available carriers is not an issue when the supporting shipper has no unmet transportation requirements. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 146200, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-76068 (March 1993).

No need for additional common carrier service is shown when the supporting shipper's transportation requirements are being met satisfactorily by its current carrier, and the shipper has not inquired about the availability of its current carrier or other existing carriers to meet anticipated additional transportation requirements. RCW 81.80.070 (entry common carriers: need for service; search for service). Order M. V. No. 146200, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-76068 (March 1993).

If a protestant has not made reasonable efforts to make itself known to shippers in the territory, the supporting shippers' failure to discover the protestant during their search does not reflect negatively on the reasonableness of their search. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 145708, In re ENA Couriers (Seattle), Inc., App. No. E-75722 (October 1992).

The usual way a shipper demonstrates that existing service is not sufficient to meet its needs is by showing that it has made a reasonable but unsuccessful effort to obtain the service it requires. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

Frequent and diligent calls to carriers listed in telephone directory yellow pages, and requests for referrals to other carriers, demonstrate a reasonable search for common carrier service. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 144621, In re Gordon Trucking, Inc., App. No. E-74570 (February 1992).

The testimony of a supporting shipper witness who does not have direct knowledge of the extent of the shipper's search for available carriers is entitled to little weight. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 143915, In re Janicki Logging Co., Inc., App. No. E-74600 (September 1991).

The failure of supporting shippers to seek service from anyone other than their preferred carriers' drivers substantially discredits their claim that a need exists for an additional common carrier. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 143097, In re Robert A. Hurley, d/b/a AAA Northwest Towing, App. No. E-20003 (April 1991).

A shipper must make a reasonable effort to obtain service from existing carriers in order to establish need for an additional common carrier unless it is shown that the search would be futile. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 142671, In re Sandra Fields & Dennis Scott, d/b/a D & S Couriers, App. No. P-72937 (April 1991).

**Search for Service (cont.)**

A shipper who has not made a reasonable effort to obtain transportation service from existing carriers has not ordinarily established need for an additional carrier. The search must be one which is reasonably likely to yield an available carrier. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 142636, In re Joseph A. Decker, d/b/a Decker Enterprises, App. No. P-73582 (January 1991).

A search for service from existing carriers from a shipper's own list is reasonable when the list consists of a large number of carriers, including the protestant. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 141202, In re R. E. Bailey Construction, Inc., App. No. P-73207 (April 1990).

A search for carriers from one's own list does not in itself render a search for services unreasonable. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 137927, In re Gordon Trucking, Inc., App. No. E-19530 (September 1988).

When shippers have not shown a reasonable search for service and protestants have the equipment, the authority and the ability to provide the desired service to the satisfaction of the shippers, no need has been shown for additional carriers. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 138123, In re Food Express, Inc., App. No. P-71340 (July 1988).

Testimony of supporting shippers about difficulties in obtaining overnight parcel delivery service shows need for additional common carrier authority. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 133107, In re Mail Dispatch, Inc. d/b/a M.D.I., App. No. E-18928 (December 1985).

Supporting shippers who have used the protestant's services, but can give no reason why the protestant's services are no longer satisfactory, have not shown that another carrier is required. RCW 81.80.070 (entry common carriers: need for service; search for service). Order M. V. No. 131975, In re Thomas K. Munro, App. No. E-19065 (June 1985).

When searches for available carriers have not turned up satisfactory service, but limited service is available, and the evidence fails to demonstrate that available carriers advertise in the territory, need for an additional carrier is demonstrated. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 131682, In re Ralph and Nancy Giesy d/b/a Giesy Delivery, App. No. P-68063 (April 1985).

When supporting shippers testify that a service would be of great use, but that no other carriers have been sought out, and when other carriers provide the service, the applicants have not demonstrated that an additional carrier is needed by the public. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 129635, In re Susan Schlosser and Peggy Blake d/b/a The Paper Jogger, App. No. P-67065 (May 1984).

**Search for Service (cont.)**

Testimony of supporting shippers, who are all corporate affiliates of the applicant, does not establish that existing service is inadequate or demonstrate a need for an additional common carrier when the transportation service is within the applicant's currently held contract carrier authority and when the

## **RCW 81.80.070**

shippers have made no inquiry about whether other common carriers could provide the service. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 129581, In re G & L Transport, Inc., App. No. P-67188 (April 1984).

A shipper who makes a two-hour search by telephone for carriers from his own list and is unable to secure service has made a reasonable search for a carrier. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 129068, In re John F. Mitchell, App. No. P-67157 (January 1984).

Testimony that indicates that it is at times difficult to obtain carriers during the peak season, without a showing that the shipper's business was adversely affected or that any search for common carrier service was unsuccessful, does not demonstrate a need for another carrier. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 128115, In re Kenneth D. Peterson d/b/a Ken D. Peterson Trucking, App. No. P-67040 (September 1983).

Supporting shippers who utilize existing carriers, who have only rare difficulties obtaining service, and who have not made reasonable but unsuccessful searches for alternative carriers, have not demonstrated a need that supports a grant of authority. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 128061, In re James D. Hanson d/b/a Earl Hanson Trucking Co., App. No. E-18676 (August 1983).

If a supporting shipper does not specify the problems that it might have experienced, nor detail the nature of any search undertaken for the purpose of fulfilling transportation needs, the evidence is not sufficient to show need for an additional carrier. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 126429, In re Glenn Mar, Inc., App. No. P-65982 (November 1982).

When there is no indication of present or future difficulty in obtaining transportation, and the shipper has not asked present available carriers for service, there is no demonstrated need for additional carriers. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

Testimony of the applicant's partner, as a supporting shipper, that no investigation has been made about available carriers and that he has experienced no difficulty obtaining intrastate transportation of oil rigs, states no need for additional common carriage. RCW 81.80.070 (entry common carriers: search for service). Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

### **Entry Common Carriers: Specialized Equipment or Service**

The degree of control by the permit holder necessary to protect the public is absent and the arrangement is inconsistent with WAC 480-12-210, if a driver is "on the payroll" only as a mechanical means of making payment of a commission to the driver, compensation is based on a percentage of gross revenue, and the driver alone is responsible for virtually all expenses incurred in that operation. RCW 81.80.070 (contract). Order M. V. No. 139898, In re North Counties Freight Lines, Inc./Mayne Nickless Courier Systems, Inc., d/b/a Bucky's Courier Systems, App. No. P-72291 (July 1989).

General freight carriers that accept shipments of all sizes may not constitute a viable alternative to specialized parcel delivery service. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 141006, In re Becker Trucking, Inc., d/b/a Becker Trucking: Becker Express, App. No. E-19787 (March 1990).

When a protestant does not possess specialized equipment required by shippers but has access and is ready, willing and able to secure such commercially available equipment, applicant's possession alone will not entitle it to a grant of common carrier authority. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 138604, In re Food Express, Inc., App. No. P-71340 (November 1988).

No demonstration of need for specialized pneumatic equipment has been made when protestants have provided satisfactory services for the shippers using diesel blowers and portable vacuum units and are willing and able to purchase electric blowers and vacuum trailers, which are readily available commercially, if its customers desire it. RCW 81.80.070 (entry common carriers: need for service; specialized equipment or service). Order M. V. No. 138123, In re Food Express, Inc., App. No. P-71340 (July 1988).

Evidence of applicant's specialized equipment is insufficient to base a grant of authority when the equipment is not shown to be unique and protestant has similar equipment available for use by the shipper. RCW 81.80.070 (entry common carriers: need for service; specialized equipment or service). Order M. V. No. 137791, In re William D. Dorn, d/b/a Bill Dorn Trucking, App. No. E-19500 (May 1988).

When an applicant has demonstrated that shippers need specialized equipment which the protestant does not possess and which is shown to be in short supply, the circumstances indicate need for additional common carrier authority. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 137697, In re John W. Zuber, d/b/a Zuber Construction, App. No. P-71456 (May 1988).

A true innovation in equipment supports a grant of common carrier authority if it stimulates competition and encourages innovation, efficiency and improvement of service. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 137347, In re Redondo Heights Wrecker Service, Ltd., App. No. E-19454 (February 1988).

## **RCW 81.80.070**

### **Specialized Equipment or Service (cont.)**

An applicant's possession of specialized equipment sufficient to accomplish the desired transportation does not entitle the applicant to the traffic when the protestant is ready, willing and able to secure sufficient specialized equipment for the traffic in a timely manner. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 136013, In re Bragg Investment Co., Inc., d/b/a J.B.A Co., App. No. P-70468 (May 1987).

Proof of applicant's possession of innovative equipment, without proof that the equipment is reasonably required by shippers, does not demonstrate that the public convenience and necessity require the carrier's innovation. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 134063, In re Fred L. Tripp d/b/a T & T Wood Products, App. No. P-69580 (May 1986).

When there is evidence supporting a finding that the protestant's equipment will completely satisfy the shipper's reasonable needs, and that--if the shipper develops a need for it--the protestant is willing to acquire specialized equipment, the applicant's possession of specialized equipment does not demonstrate that the public convenience and necessity require a grant of additional authority. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 133660, In re Washington Trucking, Inc., App. No. E-19174 (March 1986).

One of the central purposes of transportation regulation is to assure that satisfactory service is available to all shippers no matter what the size of their shipments or the part of the state in which they are located. When shippers experience problems obtaining common carrier transportation due to shipping patterns, additional authority will be granted for the areas of demonstrated need. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 133386, In re West Coast Auto Transport, Inc., App. No. P-68746 (January 1986).

A business opportunity or efficiency presented by possible improvements in transportation service may support a showing of public convenience and necessity. A proposed operation that will offer both small log hauling and wood chip and hogged fuel transportation not presently available to the shipper, but which is helpful to the shipper, supports an application for additional authority. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 133246, In re Mountain Logging, Inc., App. No. E-19084 (January 1986).

An applicant who has proposed an innovation in service but can't show how his service would affect any of his supporting shippers, has not demonstrated a need for the proposed service. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 131310, In re United Truck Lines, Inc., App. No. E-18895 (January 1985).

When an applicant conducted operations requiring expertise and special equipment in good faith and the protestants--at the time these operations were commenced--had neither the expertise nor the equipment to conduct those operations, the applicant can demonstrate need satisfying the statutory requirement despite the current ability of the protestants to handle this need. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 130795, In re Amalgamated Services, Inc., App. No. P-66826 (October 1984).

### **Specialized Equipment or Service (cont.)**

Testimony of a supporting witness that does not show need for specialized equipment and does not show effort to contact existing carriers, does not meet the burden of demonstrating that the proposed service is reasonably required by the public convenience and necessity. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 129625, In re Joe Sicilia, Inc., App. No. P-67272 (April 1984).

Possession of new specialized equipment, representing a true innovation and permitting true efficiencies, may constitute a basis for a grant of authority if the shipper's other requirements can be met and protestants lack similar available equipment. RCW 81.80.070 (entry common carriers: need; specialized equipment or service). Order M. V. No. 129315, In re Donald W. Lemmons d/b/a Interstate Wood Products, App. No. E-18789 (April 1984).

When an applicant proposes to meet a shipper's regular, albeit infrequent, need for specialized equipment that the applicant possesses but the protestant does not, and shows evidence of future need in other parts of the state, the applicant demonstrates public need for an additional carrier and a grant of its application is proper. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M.V. No. 129059, In re Quality Transport, Inc., App. No. P-64965 (January 1984).

When a supporting shipper demonstrates that a carrier has equipment especially suited to meet the shipper's ongoing requirements, and that the volume and location of the transportation will make it difficult to obtain service from other carriers, the shipper has stated a need for an additional carrier. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 127454, In re Earl & Michael Green d/b/a Monax Trucking, App. No. E-18709 (May 1983).

When the supporting shipper testifies that it is aware of the protestant's services yet demonstrates that the applicant's specialized services are better suited to his requirements, it supports a grant of additional authority. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 126442, In re United Drain Oil Service, Inc., App. No. P-65787 (October 1982).

It is not realistic to require existing carriers to possess sufficient equipment for needs that may in the future, but do not now, exist. A protestant who possesses sufficient equipment to meet immediate needs and who has ready access to other equipment for larger scale moves on short notice, has demonstrated an ability to provide satisfactory service. RCW 81.80.070 (entry common carriers: specialized equipment or service). Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

### **Entry Common Carriers: Territory**

It is the Commission's policy to grant authority to the full extent of demonstrated need. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 148367, In re Redline Courier, Inc., App. No. P-77664

## **RCW 81.80.070**

(December 1994).

The Commission generally will not restrict service within a territory to the precise shipping patterns of the supporting witnesses. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 148367, In re Redline Courier, Inc., App. No. P-77664 (December 1994).

In a protested application for broad territory, if the applicant has made a prima facie demonstration of need throughout the territory but has not demonstrated specific instances of unmet need in the protested portion of the territory, and the sole protestant has unconditionally withdrawn after presenting evidence, the Commission may include the formerly-protested territory in the grant of authority when that result is consistent with the evidence viewed as a whole. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 146358, In re Steve Karabach, d/b/a Steve Karabach Trucking, App. No. E-76408 (April 1993).

When a portion of broad territory is protested, and the protestant submits credible evidence that it makes itself known to the community in that portion and that it can handle additional business, the applicant must present evidence of need within the protested portion to demonstrate that the public convenience and necessity require an additional carrier in that portion. RCW 81.80.070 (entry common carriers: territory; burden; need). Order M. V. No. 146358, In re Steve Karabach, d/b/a Steve Karabach Trucking, App. No. E-76408 (April 1993).

An applicant who seeks broad territorial authority need not present shippers' evidence of specific service failures in every part of the territory to make a prima facie demonstration of public convenience and necessity throughout the territory. RCW 81.80.070 (entry common carriers: territory; need for service). Order M. V. No. 146358, In re Steve Karabach, d/b/a Steve Karabach Trucking, App. No. E-76408 (April 1993).

Evidence of only limited territorial need in an application for common carrier authority will support a grant of authority only to the reasonable extent of the need shown. RCW 81.80.010; 81.80.070 (entry common carriers: territory). Order M. V. No. 146106, In re Lyle C. & Larry E. Jones, d/b/a Lyle C. Jones Trucking, App. No. E-75654 (February 1993).

When an applicant seeks statewide authority but submits evidence of support only for Eastern Washington and Snohomish County, authority should be granted only to the extent of demonstrated need. RCW 81.80.070 (entry common carriers: statewide authority; territory). Order M. V. No. 145984, In re Larry Honn & Son, App. No. P-75586 (January 1993).

Generally, a grant of authority will be limited to the territory in which the supporting shippers conduct their operations. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 145062, In re Pro Ag Transport, Inc., App. No. E-75096 (June 1992).

### **Territory (cont.)**

When broad territory is sought, an applicant need not show a need in every community or in every corner of the territory, but must show present or future need throughout the territory. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 144730, In re Gerald R. Severson, App. No. P-75194 (March 1992).

When an applicant proves need for service in a much smaller territory than it seeks, the Commission will only grant authority consistent with proof of need. RCW 81.80.010; 81.80.070 (entry common carriers: need). Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

A protestant to an application for contract carriage is not required to solicit business from supporting shippers in order to meet its burden of demonstrating that it is ready, willing and able to perform the requested service. RCW 81.80.070 (burden of proof). Order M. V. No. 137346, In re Smith Transport, Inc., App. No. P-71155 (February 1988).

When broad territory is sought, an applicant need not show operations in every community or in every corner of the territory, but must show present or future need throughout the territory. RCW 81.80.070 (entry common carriers: need for service; territory). Order M. V. No. 136956, In re Jess M., Mike J., Jeff L. and Steve M. McClung, d/b/a Glacier Construction Co., App. No. P-71053 (December 1987).

When a shipper cites a broad territory of operations throughout the state and when it has consistently experienced a pattern in which carriers will not travel to remote areas for short-term hauls, statewide need for common carrier service has been shown. RCW 81.80.070 (entry common carriers: statewide authority). Order M. V. No. 136956, In re Jess M., Mike J., Jeff L. and Steve M. McClung, d/b/a Glacier Construction Co., App. No. P-71053 (December 1987).

An applicant for common carrier authority throughout the state must demonstrate more than speculation of need. When supporting shippers conduct their operations in only four counties, the grant should be limited to that territory. RCW 81.80.070 (entry common carriers: statewide authority). Order M. V. No. 136566, In re Gambler Construction, Inc., App. No. P-70780 (September 1987).

The mere mention of locations by a supporting shipper does not prove a need for service to and from those locations. Establishment of a prima facie case that another carrier is needed is required for a grant of authority. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 132952, In re Brett & Son, Inc., App. No. E-19072 (November 1985).

Local cartage authority is needed only for service that commences in a regulated city and terminates in the same city. RCW 81.80.070 (entry common carriers: territory); WAC 480-12-080(2). Order M. V. No. 131210, In re Signal Electric Inc., App. No. P-68373 (January 1985).



## **RCW 81.80.070**

### **Territory (cont.)**

An applicant must present evidence of local cartage need before the Commission will grant local cartage authority. RCW 81.80.070 (entry common carriers: territory); WAC 480-12-990(e). Order M. V. No. 131210, In re Signal Electric, Inc., App. No. P-68373 (January 1985).

Testimony of a supporting shipper whose business is in only one county not already authorized to the applicant does not support a statewide grant of authority even though the application is largely unopposed. RCW 81.80.070 (entry common carriers: statewide authority). Order M. V. No. 129469, In re Thomas R. Abbott, App. No. E-18899 (April 1984).

When an applicant seeks statewide authority to operate dump trucks but submits evidence of support only for Western Washington and Kittitas County, authority should be granted only to the extent of demonstrated need. RCW 81.80.070 (entry common carriers: statewide authority). Order M. V. No. 129470, In re The Nestaval Corporation, App. No. P-67706 (April 1984).

An applicant for statewide authority who seeks to remove permit restrictions against retail store delivery, who presents only five shipper witnesses from a narrow geographic area, does not support the removal of the restriction--even when the application is largely uncontested. RCW 81.80.070 (entry common carriers: statewide authority). Order M. V. No. 128995, In re United Parcel Service, Inc., App. No. E-18527 (January 1984).

A written statement that a shipper has logs to ship from various portions of the state, but which does not specify which counties nor state a need for additional carriers, is insufficient to support an application. RCW 81.80.070 (entry common carriers: territory); WAC 480-12-045(6). Order M. V. No. 129687, In re Allen Brown d/b/a Allen Brown Woodwaste, App. No. P-67126 (October 1983).

A shipper who can account for only 3 instances of operations outside of Lewis County in the past 15 years, and who is without definite plans to operate outside of Lewis County, has not stated a need for service beyond Lewis County. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 128671, In re Larry G. Gladsjo d/b/a L. G. Logging, App. No. P-67126 (October 1983).

Multiple supporting shippers who do not demonstrate that their present or future needs for transportation will be in the territory sought to be acquired by applicant, do not support the application in those territories. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 128061, In re James D. Hanson d/b/a Earl Hanson Trucking Co., App. No. E-18676 (August 1983).

Inadequate service by one carrier in one territory does not demonstrate the need for an additional carrier in another territory. The Commission will restrict a grant of authority to what is justified by shipper need. RCW 81.80.070 (entry common carriers: territory). Order M. V. No. 127999, In re Leroy Dodrill, App. No. E-18743 (August 1983).

**Contract Carriers: General; Definition; Difference From Common Carriers**

**Appellate decision.** Service that is neither common carriage nor proprietary in nature is classified as contract carriage pursuant to Farm Supply Corporation v. WUTC, 83 Wn.2d 446, 518 P.2d 1237 (1974).

The issue in a contract carrier application is whether a grant of authority is consistent with the public interest. RCW 81.80.070 (contract carrier: public interest tests). Order M. V. 147419, In re Food Express, Inc., App. No. P-76833 (March 1994).

Although the Commission cannot grant contract carrier authority in excess of proven need, it may grant authority under a commodity description that includes substantially similar commodities whose transportation requirements are substantially similar. RCW 81.80.070 (contract carriers: general). Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).

A contract carrier application need not demonstrate that the applicant's service is required by the public convenience and necessity. RCW 81.80.070 (contract carriers: differences from common carriers). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

Use of specialized equipment is not a prerequisite for contract carrier authority. RCW 81.80.010(5); RCW 81.80.070 (contract carriers: general; public interest factors). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

Due to the nature of armored car service and its regulation by this Commission, some elements of the Klien & Gudge guidelines for the contract carrier public interest test are not appropriate in a territorial application for contract carriage, e.g., inquiries as to shipper commitment, the number of shippers and the shippers' requirements. RCW 81.80.070 (contract carriers: differences from common carriers). Order M. V. No. 139292, In re Oregon Armored Service, Inc., App. No. P-71976 (March 1989).

When the type of service sought contains elements of both contract and common carriage, a review of both the public interest and the public convenience and necessity standards may be appropriate. RCW 81.80.070 (entry common carriers: need for service; contract carriers: differences from common carriers). Order M. V. No. 139292, In re Oregon Armored Service, Inc., App. No. P-71976 (March 1989).

Applications for armored car contract authority contain elements appropriate for the analysis given to common carriage applications. RCW 81.80.070 (contract carriers: differences from common carriers). Order M. V. No. 139292, In re Oregon Armored Service, Inc., App. No. P-71976 (March 1989).

Transportation of associated materials and supplies will be authorized with the authorized movements of principal items. RCW 81.80.070 (contract carriers: general). Order M. V. No. 139068, In re Gene Peterson, App. No. P-71497 (February 1989).

## **RCW 81.80.070**

### **Contract Carriers (cont.)**

The Commission will reverse a finding in a proposed order stating that a service is not contract carriage solely because it is not specialized, when the service is neither common or proprietary carriage. RCW 81.80.010; RCW 81.80.070 (contract carriers: difference from common). Order M. V. No. 134850, In re Karen K. Urban, d/b/a Rush Delivery Service, App. No. E-19255 (October 1986).

The Commission is not bound by a shipper's decision to seek the designation "contract carrier". The Commission will examine the service needs of the shipper and other relevant information prior to deciding on a grant of contract carrier authority. RCW 81.80.070 (contract carriers: general). Order M. V. No. 133953, In re Burnham Services Company, Inc., App. No. P-69575 (May 1986).

An application for common carrier authority may not be amended to restrict the transportation to a single shipper. RCW 81.80.070 (contract carriers: difference from common). Order M. V. No. 126620, In re Steve L. & Lester R. Waggoner d/b/a Waggoner Trucking, App. No. E-18608 (December 1982).

### **Contract Carriers: Dual Operations**

A transferee with common carrier authority may acquire overlapping contract carrier authority by transfer unless there is a credible demonstration of a likelihood that contract shippers will receive impermissible preferences. RCW 81.80.070 (contract carriers: dual operations). Order M. V. No. 138953, In re Western Way, Inc./Jim's Transfer, Inc., d/b/a DeVries Packing and Storage, App. No. P-71767 (January 1989).

Transportation of household goods as a common carrier does not conflict with general freight contract carriage and does not present the opportunity for exercising an impermissible preference. RCW 81.28.190; RCW 81.80.070 (contract carriers: dual operations); WAC 480-12-050(5). Order M. V. No. 127922, In re McKenzie Moving & Storage, Inc./Dedicated Trucking Corporation, App. No. P-66727 (July 1983).

An applicant with limited common carrier authority (logs only), who seeks authority as a contract carrier of precast panels, in special equipment, will have no opportunity to afford an undue preference to its contracting shipper over its common carrier shippers and contract authority may be granted. RCW 81.28.190; RCW 81.80.070 (contract carriers: dual operations); WAC 480-12-050(5). Order M. V. No. 127985, In re William P. LeVeaux d/b/a LeVeaux Trucking, App. No. P-66676 (July 1983).

### **Contract Carriers: Fitness**

If a carrier's operations are not presently in compliance with Commission regulations, its operating witness' assurances of future compliance with Commission laws and regulations are not credible when the witness lacks knowledge and understanding of Commission rules and laws and of the carrier's day to day operations. RCW 81.80.070 (contract carriers: fitness). Order M. V. No. 147200, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-76090 (November 1993).

**Contract Carriers (cont.)**

The Commission's acceptance of a contract does not constitute a conclusive determination as to the legality of the service to be performed under the contract. RCW 81.80.070 (contract carriers: fitness); WAC 480-12-255. Order M. V. No. 140955, In re United Couriers, Inc., App. No. E-19716 (February 1990).

A finding that an applicant is unfit to operate as a contract carrier will be affirmed when supported by substantial evidence. RCW 81.80.070 (contract carriers: fitness; Former WAC 480-08-240(13). Order M. V. No. 137088, In re Roy N. Carlson, Inc., App. No. P-70991 (December 1987).

**Contract Carriers: Preference**

When the services the shipper requires are available from common carriers, and the shipper supports the applicant merely because of a preference for his services, a grant of common carrier authority is not consistent with the public interest. RCW 81.80.070 (contract carriers: preference; public interest tests). Order M. V. No. 147546, In re Richard H. Henke, d/b/a Richard H. Henke Trucking, App. No. P-77008 (March 1994).

When shippers make reasonable but unsuccessful attempts to work out their shipping problems with common carriers prior to supporting the application of an alternative carrier, their support is not mere preference. RCW 81.80.070 (contract carriers: preference). Order M. V. No. 139305, In re Ronald E. and Gerald H. Thompson and Bobby R. Godwin, d/b/a T & G Trucking Co., App. No. P-71366 (February 1989).

A shipper's mere preference for an applicant is not sufficient to support a finding that contract carriage is consistent with the public interest. RCW 81.80.070 (contract carriers: preference). Order M. V. No. 126916, In re Blackburn Truck Lines, Inc., App. No. E-18631 (August 1983).

## **RCW 81.80.070**

### **Contract Carriers: Public Interest Test/Public Interest Factors**

#### **-- General**

The issue in a contract carrier application is whether a grant of authority is consistent with the public interest. RCW 81.80.070 (contract carrier: public interest test). Order M. V. 147419, In re Food Express, Inc., App. No. P-76833 (March 1994).

Contract carriage is reserved for situations in which the carrier has special needs requiring services or control over transportation not readily available from common carriers, or the nature of the service required makes it particularly suited to contract carriage. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 147546, In re Richard H. Henke, d/b/a Richard H. Henke Trucking, App. No. P-77008 (March 1994).

An application for contract carrier authority should be evaluated on the basis of the evidence of present or future public interest in the applicant's service at the time the application was filed. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. 141375, In re Nello Pistoiresi & Son, Inc., App. No. E-19812 (May 1990).

Although a supporting shipper has demonstrated that contract carrier service may be appropriate to its needs, the Commission will deny the application if the applicant has not proposed a lawful means to provide the service. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-255. Order M. V. No. 140275, In re United Couriers, Inc., App. No. E-19716 (September 1989).

A statutory requirement that the shipper contract for certain services does not, by itself, support a grant of contract carrier authority. Common carriers' contracts with shippers are not improper so long as the contract terms are consistent with regulated common carriage. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139903, In re Northwest Meter Reading, Inc., App. No. P-72180 (July 1989).

When common carriers can and commonly do provide the proposed service; when no special circumstances identify the service as one appropriate for contract carriage; and when neither the applicant nor the supporting shipper would suffer significant adverse effects if the application were denied, a grant of contract carrier authority is not shown to be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139903, In re Northwest Meter Reading, Inc., App. No. P-72180 (July 1989).

Five elements are analyzed to determine whether a contract carrier application is consistent with the public interest: (1) the number of shippers to be served by the applicant; (2) the nature of the services provided; (3) the effect that granting the services would have on the protesting carriers; (4) the effect denying the service would have on the applicant or its shipper; and (5) the changing character of the shipper's requirements. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

### **Contract Carriers: Public Interest (cont.)**

When the type of service sought contains elements of both contract and common carriage, a review of both the public interest and the public convenience and necessity standards may be appropriate. RCW 81.80.070 (entry common carriers: need for service; contract carriers: differences from common carriers, public interest factors). Order M. V. No. 139292, In re Oregon Armored Service, Inc., App. No. P-71976 (March 1989).

The fact that another carrier already possesses authority similar to authority the applicant seeks demonstrates that the other carrier is presumed to have met the pertinent standards--not that the present applicant or any other carrier deserves authority without meeting those standards. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139215, In re United Couriers, Inc., App. No. E-19645 (March 1989).

A grant of contract carrier authority requires evidence demonstrating how or why the service would be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 138954, In re United Couriers, Inc., App. No. E-19645 (January 1989).

When a carrier retains control of "dedicated" equipment and is not proposing to meet the shipper's full needs, the carrier has not met the federal guidelines on dedication of equipment as an element of contract carriage. 49 USC 303 (15); RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 137282, In re Savage Western Transports, Inc., App. No. P-70998 (February 1988). Order M. V. No. 137283, In re Bi-County Trucking, Inc., App. No. P-71011 (February 1988).

Common carriage provides the broadest possible service to the public. A finding that an applicant proposes to provide no service that is not available from common carriers, supports a conclusion that a grant of contract carrier authority is not consistent with the public interest. Former RCW 34.04.090(7); RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 133952, In re Desert Star, Inc., App. No. P-69754 (May 1986).

In reviewing a contract carrier application the Commission applies a two-part inquiry: (1) is the proposed service special and unique, or neither common nor proprietary carriage; and (2) would a grant of contract carrier authority be in the public interest? RCW 81.80.070 (contract). Order M. V. No. 133781, In re Donald R. Blankenship d/b/a Blankenship Transport, App. No. P-69189 (April 1986).

When there is one shipper to be served, the contract of the shipper requires special services under the control of the shipper, the service to the shipper will be stable, the protestant will be unaffected by a grant of authority, and when the effect of denial of the application would be to force the shipper to resort to proprietary carriage and put the applicant out of business, a grant of contract carrier authority is consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 133781, In re Donald R. Blankenship d/b/a Blankenship Transport, App. No. P-69189 (April 1986).

## **RCW 81.80.070**

### **Contract Carriers: Public Interest Factors (cont.)**

Five factors are important to determining whether a grant of contract carrier authority is consistent with the public interest: (1) the number of shippers; (2) the nature of the services proposed; (3) the effect of the proposed services on existing carriers; (4) the effect of denial on shipper and applicant; and (5) the changing character of shipper's requirements. RCW 81.80.070 (contract carriers: public interest factors).

Order M. V. No. 133781, In re Donald R. Blankenship d/b/a Blankenship Transport, App. No. P-69189 (April 1986).

Order M. V. No. 126586, In re Ronald D. Klien and Larry G. Gudgel d/b/a J Lor Trucking, App. No. P-65762 (December 1982).

### **--- Number of Shippers to be Served**

Service to six shippers under a contract carrier permit may not be inconsistent with contract carriage when two of the shippers are beverage distributors who require service not available from common carriers, and the other four are shippers of meat and meat by-products--commodities long recognized as appropriate for contract carriage. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-255(7). Order M. V. No. 141005, In re Nello Pistoiresi & Son, Inc., App. No. E-19812 (March 1990).

A grant of contract carrier authority is consistent with the public interest when the carrier provides service to one shipper, on call, on an expedited basis, and no other carrier is available with suitable equipment nearby nor willing to station such equipment nearby. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 131563, In re Liquid Transporters, Inc., App. No. P-68139 (May 1985).

### **--- Specialty and Uniqueness of Proposed Service; Appropriateness of Contract Carriage**

Shipper convenience is a factor that the Commission may consider in an application for contract carrier authority. RCW 81.80.070 (contract carrier: public interest factors). Order M. V. 147419, In re Food Express, Inc., App. No. P-76833 (March 1994).

Need for dedicated equipment to assure usability without expensive cleaning and verified need for driver expertise can be legitimate specialized shipper needs that support a grant of contract carrier authority. RCW 81.80.070 (contract carrier: public interest factors). Order M. V. 147419, In re Food Express, Inc., App. No. P-76833 (March 1994).

That a shipper has given an applicant a key for after-hours access does not establish that the nature of the service is so personalized or sensitive that it is consistent with contract carriage, when the service has been and can be performed satisfactorily without after-hours access, and the shipper has given the applicant a key merely to accommodate the applicant's schedule. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 147546, In re Richard H. Henke, d/b/a Richard H. Henke Trucking, App. No. P-77008 (March 1994).

### **Contract Carriers: Public Interest Factors (cont.)**

That an applicant can provide a coordinated intra and interstate service for a shipper does not by itself make the service specialized in a way that is consistent with a grant of contract carrier authority; there must be

some showing that coordinated intra and interstate service from a single carrier offers a substantial advantage to the shipper. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 147546, In re Richard H. Henke, d/b/a Richard H. Henke Trucking, App. No. P-77008 (March 1994).

When the services the shipper requires are available from common carriers, and the shipper supports the applicant merely because of a preference for his services, a grant of common carrier authority is not consistent with the public interest. RCW 81.80.070 (contract carriers: preference; public interest factors). Order M. V. No. 147546, In re Richard H. Henke, d/b/a Richard H. Henke Trucking, App. No. P-77008 (March 1994).

When a shipper requires carrier service that will function solely as the shipper's shipping division, with dedicated equipment and other characteristics of contract carriage, the service is appropriate for contract carriage. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 147200, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-76090 (November 1993).

When the relationship between a shipper and a carrier involves substantially more than transportation and traditional accessory services, and the pattern of relationships between them is unique in its ability to provide efficient service for both shipper and carrier, contract carriage may be appropriate even though the transportation services are available from common carriers. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 146978, In re First Installation Repair & Service, Inc., d/b/a First, Inc., App. No. P-76480 (September 1993).

Shipper convenience is a factor that the Commission may consider in an application for contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 146978, In re First Installation Repair & Service, Inc., d/b/a First, Inc., App. No. P-76480 (September 1993).

Provision of equipment for a shipper's traffic, by itself, does not constitute a specialized service and will not, without more, require the Commission to grant an application for contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-255. Order M. V. No. 145480, In re Metro Freight Systems, Inc., App. No. E-75542 (September 1992).

Liquified petroleum gas's dangerous nature and shippers' interest in exercising greater control over its transportation than is possible under common carriage make contract carriage appropriate for its transportation. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).



## **RCW 81.80.070**

### **Contract Carriers: Public Interest Factors (cont.)**

A shipper's reasonable requirement for dedicated equipment and for a high degree of control over transportation that is not generally associated with common carriage is consistent with a grant of contract carriage. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 143743, In re P & N Trucking Service, Inc., App. No. P-74144 (August 1991).

When the service needs identified by the shipper are performed in the ordinary course of business by common carriers, and the proposed service is not of a type that is unusually appropriate for contract carriage, a grant of contract authority is not consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors); 81.80.020. Order M. V. No. 143447, In re Robert B. Lewis, d/b/a Lewis Distributing, App. No. P-74079 (July 1991).

A showing that a proposed contract service will provide an integrated inter and intrastate service does not distinguish the proposed service as special or unique. Without some showing that specialized needs of the shippers require service from only one carrier for coordinated inter and intrastate service, there is no showing that the service offered is specialized in a way that is consistent with a grant of contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 143490, In re Interstate Distributor Co., App. No. E-19994 (July 1991).

When existing common carriers are ready, willing and able to provide the transportation services required by the supporting shippers; when there are no special needs of the shippers that identify the service as one appropriate for contract service; when neither the applicant nor the shipper would suffer significant adverse affects if the application were denied; and when granting the application would have a significant adverse impact on the protestants, a grant of contract carrier authority is not consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 143490, In re Interstate Distributor Co., App. No. E-19994 (July 1991).

Opening a valve and slowly driving forward to "apply" a liquid to the ground does not constitute an ancillary service requiring special skill; rather, the action constitutes a method of unloading the commodity. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990).

A shipper's need for transportation upon short notice does not, alone, support a grant of contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990).

Service to six shippers under a contract carrier permit may not be inconsistent with contract carriage when two of the shippers are beverage distributors who require service not available from common carriers, and the other four are shippers of meat and meat by-products--commodities long recognized as appropriate for contract carriage. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-255(7). Order M. V. No. 141005, In re Nello Pistoiresi & Son, Inc., App. No. E-19812 (March 1990).

### **Contract Carriers: Public Interest Factors (cont.)**

Carrier service requiring key entry by drivers and the delivery of documents requiring timely processing on an established schedule in order to avoid very serious consequences is appropriate for contract carriage, despite common carriers' ability to perform the service. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 140275, In re United Couriers, Inc., App. No. E-19716 (September 1989).

A grant of contract carrier authority may not be consistent with the public interest if the service provided under the contract is not specialized or unique and can be provided by common carriers such as the protestant, and if the applicant and the shipper would suffer little or no adverse effect if the authority were denied. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139903, In re Northwest Meter Reading, Inc., App. No. P-72180 (July 1989).

A statutory requirement that the shipper contract for certain services does not, by itself, support a grant of contract carrier authority. Common carriers' contracts with shippers are not improper so long as the contract terms are consistent with regulated common carriage. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139903, In re Northwest Meter Reading, Inc., App. No. P-72180 (July 1989).

When the nature of the service provided is not consistent with contract carriage, a grant of that authority is not appropriate, notwithstanding the lack of available carriers. Redocketing of the application may be allowed and the applicant may apply for common carrier authority. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-045. Order M. V. No. 139493, In re Jim Elsbree, d/b/a J & P Trucking, App. No. P-71880 (May 1989).

Contract carriage assures shippers access to for-hire motor carrier service they need to meet special needs requiring services or control over transportation not offered by common carriers. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

An application for contract carrier authority that offers services readily available from common carriers is generally not consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

Use of specialized equipment is not a prerequisite for contract carrier authority. RCW 81.80.010(5); RCW 81.80.070 (contract carriers: general; public interest factors). Order M. V. No. 139687, In re Morris Trucking, Inc., App. No. P-72098 (May 1989).

The Commission may grant contract carrier authority, despite common carriers' apparent ability to perform the service, under circumstances where substantial questions of the shipper's liability could result from the carrier's improper handling of the shipment. RCW 81.80.010(5); RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139129, In re Gary R. Brister, d/b/a G & G Transfer, App. No. E-19657 (February 1989).

## **RCW 81.80.070**

### **Contract Carriers: Public Interest Factors (cont.)**

Four shippers' unmet requirement for coordinated service on short notice may show a special need for service, supporting a grant of contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors); RCW 81.80.010(5). Order M. V. No. 139305, In re Ronald E. and Gerald H. Thompson and Bobby R. Godwin, d/b/a T & G Trucking Co., App. No. P-71366 (February 1989).

A grant of contract carrier authority requires a showing of special circumstances or needs that make contract carriage appropriate. RCW 81.80.010(5); RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 138954, In re United Couriers, Inc., App. No. E-19645 (January 1989).

A shipper's unsubstantiated claim of need for coordinated intrastate/interstate service will not provide the basis for a grant of intrastate authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 138954, In re United Couriers, Inc., App. No. E-19645 (January 1989).

Transportation performed in vehicles dedicated to the service and serving no other shippers, upon tight time schedules required by the shipper's business, moving highly sensitive materials--when a substantial financial cost would result from delay--is appropriate to contract carriage even though the service might be performed by a common carrier. RCW 81.80.010(5); RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 138954, In re United Couriers, Inc., App. No. E-19645 (January 1989).

When a shipper requires a carrier to have available temperature-controlled vans for service within 72 hours and occasionally for emergency deliveries, a grant of contract carrier authority is not consistent with the public interest if protestant common carriers have the authority and the ability to meet those requirements. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 138325, In re Parker Refrigerated Service, Inc., App. No. P-71514 (September 1988).

"Dedication of equipment", by itself, does not constitute a specialized service and will not, without more, require the Commission to grant an application for contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 137282, In re Savage Western Transports, Inc., App. No. P-70998 (February 1988). Order M. V. No. 137283, In re Bi-County Trucking, Inc., App. No. P-71011 (February 1988).

When an applicant for contract carriage authority proposes to continue as a contract carrier the same service it performs as a common carrier, and there are no other factors rendering contract carriage consistent with the public interest, the service is not shown to be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 137282, In re Savage Western Transports, Inc., App. No. P-70998 (February 1988). Order M. V. No. 137283, In re Bi-County Trucking, Inc., App. No. P-71011 (February 1988).

Milk's perishable nature and the extra services associated with its transportation make contract carriage appropriate for its transportation. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 137088, In re Roy N. Carlson, Inc., App. No. P-70991 (December 1987).

### **Contract Carriers: Public Interest Factors (cont.)**

When a shipper requires that a carrier transport sensitive materials, within severe time constraints, under direct shipper control, a grant of contract carrier authority is consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 136858, In re United Couriers Northwest, Inc., App. No. P-70574 (October 1987).

When a contract carrier application calls for dedicated runs of exceptionally valuable cargo, under severe time limits required by the shipper, with financial costs resulting from delay, the Commission may find a contract carrier application consistent with the public interest and grant authority. RCW 81.80.070 (contract carriers: public interest factors); Order M. V. No. 136237, In re United Couriers Northwest, Inc., App. No. P-70574 (July 1987).

Specialization of service is shown by factors that affect the nature of the transportation performed. Specialization is not shown when contact with the applicant's drivers will be by means of a beepers instead of radio because beeper contact is not shown to affect the nature of the transportation to be performed. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 134850, In re Karen K. Urban, d/b/a Rush Delivery Service, App. No. E-19255 (October 1986).

Common carriage provides the broadest possible service to the public. A finding that an applicant proposes to provide no service that is not available from common carriers, supports a conclusion that a grant of contract carrier authority is not consistent with the public interest. Former RCW 34.04.090(7); RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 133952, In re Desert Star, Inc., App. No. P-69754 (May 1986).

Whether a service is special or unique is one element among several to be weighed in determining whether a grant of authority is consistent with the public interest. Along with whether the proposed service is available from existing common carriers, the specialized nature of the service may be a controlling factor. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 133952, In re Desert Star, Inc., App. No. P-69754 (May 1986).

If a contract carrier applicant offers specialized services to meet the needs of a specific shipper, the state's policy of preserving common carriage is not offended and a grant of contract carrier authority is consistent with the public interest. RCW 81.80.020; RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 133953, In re Burnham Services Company, Inc., App. No. P-69575 (May 1986).

A grant of contract carriage authority requires a showing that the service is consistent with the public interest. One of the factors for analysis is whether the proposed contract carriage has elements that make it special or unique. After-hours entry of commercial premises, with driver possession of a key, is a special element consistent with contract carriage. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 133474, In re James R. Tolin d/b/a Punctual Transportation, App. No. P-68274 (February 1986).

### **Contract Carriers: Public Interest Factors (cont.)**

A grant of contract carrier authority is consistent with the public interest when the carrier provides service to one shipper, on call, on an expedited basis, and no other carrier is available with suitable equipment

## **RCW 81.80.070**

nearby nor willing to station such equipment nearby. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 131563, In re Liquid Transporters, Inc., App. No. P-68139 (May 1985).

When a proposed contract carrier service has no special or unique aspects not readily available from existing common carriers, a grant of authority is not shown to be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 129708, In re Interstate Distributor Company, App. No. E-18925 (May 1984).

If the paramount interest of the supporting shipper is to receive reduced rates, when no unusual service is needed, and if the shipper has made no attempt to secure the services of another carrier or lower rates from existing carriers, it is not consistent with the public interest to grant authority to the applicant. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 128996, In re OK Distribution, Inc., App. No. P-67056 (February 1984).

When a bona fide need exists for a carrier familiar with the shipper and its location, requiring access to its facilities using specialized equipment, and existing common carriers have not been able to provide the required service, granting contract carrier authority to the applicant is consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 127247, In re James L. Beierle d/b/a Jim Beierle Trucking, App. No. P-66728 (March 1983).

When a supporting shipper needs specialized equipment and service; when a grant of authority would result in no loss or diversion of traffic from protestant because protestant does not now possess specialized equipment; and when intrastate service by a contract carrier would be in conjunction with the carrier's transportation of the shipper's interstate business, a grant of contract authority is found to be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 126586, In re Ronald D. Klien and Larry G. Gudgel d/b/a J Lor Trucking, App. No. P-65762 (December 1982).

When the supporting shipper's only complaint with its current service is the level of its rates, no specialized need is shown and it is not consistent with public interest to grant an application for contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 126673, In re Martin Ruiter d/b/a Martin's Feed Company, App. No. P-66095 (December 1982).

When the applicant and the supporting shipper have mutually interlocking shipping patterns that make their relationship unique in its ability to provide efficient service for both shipper and carrier, and a grant of contract carrier authority would divert no traffic from any existing carrier, a grant of authority may be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 126632, In re Northwest Fuel Co., Inc., App. No. P-66026 (December 1982).

### **Contract Carriers: Public Interest Factors (cont.)**

#### **--- Problems with Protestant**

It is not enough for a grant of contract carrier authority to show that existing carriers have not always been able to satisfy demand. An applicant for a contract carrier permit must also demonstrate that contract carriage is appropriate for the shipper's requirements. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 145480, In re Metro Freight Systems, Inc., App. No. E-75542 (September 1992).

The fact that the sole protestant cannot meet all of a shipper's needs does not establish that the services the shipper requires are not readily available from common carriers. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 145480, In re Metro Freight Systems, Inc., App. No. E-75542 (September 1992).

The applicant demonstrates public interest when if not for the applicant, a shipper would be left without necessary service, when the protestant cannot meet the shipper's needs and services provided by other carriers have been unsatisfactory in the past. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 141005, In re Nello Pistoresi & Son, Inc., App. No. E-19812 (March 1990).

Service problems occurring a year prior to a change of carriers may support a grant of authority, since the decision to switch may be prompted by an accumulation of problems, followed by time to implement the decision. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 140275, In re United Couriers, Inc., App. No. E-19716 (September 1989).

Rates for service may be considered when the existing rates are so high that it would not be feasible for the shipper to continue those services. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139292, In re Oregon Armored Service, Inc., App. No. P-71976 (March 1989).

The Commission may examine circumstances as they existed on the date of the application. Allowing a carrier--who, prior to the application, showed no interest in the territory sought--to effectively block a tenable application would be inconsistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-045(3)(d). Order M. V. No. 139292, In re Oregon Armored Service, Inc., App. No. P-71976 (March 1989).

### **Contract Carriers: Public Interest Factors (cont.)**

#### **--- Effect on Protestants**

Potential damage to existing carriers caused by the grant of contract carrier authority is shown to be considered when an order finds that an existing carrier's ability to serve the public will be impaired. RCW 81.80.070 (Contract: Public Interest Test); WAC 480-09-780. Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).

When considering an application for contract carrier authority that will result in the loss of traffic for a common carrier, the Commission will weigh the shippers' need for service and the affected common

## **RCW 81.80.070**

carrier's continued ability to meet its other public obligations. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139305, In re Ronald E. and Gerald H. Thompson and Bobby R. Godwin, d/b/a T & G Trucking Co., App. No. P-71366 (February 1989).

When the applicant and the supporting shipper have mutually interlocking shipping patterns that make their relationship unique in its ability to provide efficient service for both shipper and carrier, and a grant of contract carrier authority would divert no traffic from any existing carrier, a grant of authority may be consistent with the public interest. RCW 81.80.070 (contract carriers; public interest factors). Order M. V. No. 126632, In re Northwest Fuel Co., Inc., App. No. P-66026 (December 1982).

### **--- Effect on Supporting Shipper and Applicant**

Shipper convenience is a factor that the Commission may consider in an application for contract carrier authority. RCW 81.80.070 (contract carrier: public interest factors). Order M. V. 147419, In re Food Express, Inc., App. No. P-76833 (March 1994).

Inability to secure satisfactory alternate service without substantial charge is evidence of shipper damage that may justify contract carrier service. RCW 81.80.070 (contract carrier: public interest factors). Order M. V. 147419, In re Food Express, Inc., App. No. P-76833 (March 1994).

That an applicant for contract authority is already providing service under temporary authority has no bearing on the Commission's determination of whether denial of a parallel application for permanent authority would be detrimental to the applicant. RCW 81.80.070 (Contract: public interest test). Order M. V. No. 147200, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-76090 (November 1993).

An applicant's loss of potential carrier business follows from denial and is not an adverse effect that is relevant to consideration of an application. RCW 81.80.070 (Contract: Public Interest Test). Order M. V. No. 145426, In re Mountain States L.P. Gas Co., App. No. P-75402 (August 1992).

No adverse impact results from denial of an application when the sole harm to the applicant is that it will be returned to the position it occupied prior to the filing of its application. RCW 81.80.070 (contract carriers: public interest factors); WAC 480-12-255 (public interest). Order M. V. No. 139227, In re Parker Refrigerated Service, Inc., App. No. P-71514 (March 1989).

**Contract Carriers: Public Interest Factors (cont.)**

In contract carriage applications, the Commission considers the effect on the shipper of a denial of the application. This element maintains the health of the transportation industry by restricting entry into the market without some showing that the public would be harmed by a denial. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 139215, In re United Couriers, Inc., App. No. E-19645 (March 1989).

In determining whether a denial of contract carrier authority would adversely affect an applicant, the Commission finds no such adverse impact when a denial would merely prevent applicant from achieving a possible efficiency. RCW 81.80.070. Order M. V. No. 138325, In re Parker Refrigerated Service, Inc., App. No. P-71514 (September 1988).

Factors having no effect on the outcome of an order need not be specifically considered. Exceptions based on the failure of a proposed order to discuss how the grant of authority would effect the applicant and the supporting shipper will be denied when these factors would cause no change in either the applicant's or the shipper's situations. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 134850, In re Karen K. Urban, d/b/a Rush Delivery Service, App. No. E-19255 (October 1986).

"Harmful effect" on an applicant for contract carrier authority is measured by the degree to which the applicant's circumstances change from those that existed prior to any grant of temporary authority. Alleged harm from the loss of temporary permit authority is not a basis for granting contract carrier authority. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 134850, In re Karen K. Urban, d/b/a Rush Delivery Service, App. No. E-19255 (October 1986).

A claim that the applicant will suffer harm as the result of denial of an application is not proved when the applicant will simply be returned to the position it occupied prior to filing its application. RCW 81.80.070. Order M. V. No. 129935, In re Geer Brothers Trucking, Inc., App. No. P-67291 (July 1984).

A carrier seeking contract carrier authority has the burden of demonstrating that a grant is consistent with the public interest. When an applicant makes no showing that the application's denial would have an adverse impact upon the shipper, a grant of authority is not shown to be consistent with the public interest. RCW 81.80.070 (contract carriers: public interest factors). Order M. V. No. 129708, In re Interstate Distributor Company, App. No. E-18925 (May 1984).

**--- Changing Character of Shipper's Requirements**

The Commission may consider evidence that operations under temporary authority have been self-sustaining on the issue of the viability of proposed operations in a parallel application for permanent contract authority. RCW 81.80.070 (Contract: public interest). Order M. V. No. 147200, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-76090 (November 1993).



**RCW 81.80.070**

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**RCW 81.80.080 Application for permit.**

**Cross References**

< Application for Authority: See WAC 480-12-045.

< Applications: See WAC 480-12-030.

A contract carrier with authority to transport specified commodities statewide may file new contracts without violating RCW 81.80.080 or WAC 480-12-030, or needing rate docket hearings. RCW 81.80.080 and WAC 480-12-030 deal with applications for new authority, and under WAC 480-12-255(6) and WAC 480-12-295(9), a contract carrier with statewide authority for specified commodities may file its contracts without a rate docket hearing. Order M. V. No. 136191, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (July 1987).

The Commission will not grant authority for a permit with a commodity description that is too vague to identify the authority sought. RCW 81.80.080; RCW 81.80.130. Order M. V. No. 133329, In re James J. Balderson Trucking, Inc., App. No. P-68578 (January 1986).

**RCW 81.80.100 Form and contents of permit.**

General freight authority, restricted to parcels of specified weight, does not permit bulk shipments in specialized vehicles and a restriction against such bulk shipments is unnecessary and confusing. RCW 81.80.100; WAC 480-12-990. Order M. V. No. 147040, In re Star Moving & Storage, Inc./United Couriers, Inc., App. Nos. P-73707 & P-75799 (September 1993).

The Commission may modify a stipulated amendment when necessary to promote clarity or prevent difficult-to-enforce permits. RCW 81.80.100. Order M. V. No. 147040, In re Star Moving & Storage, Inc./United Couriers, Inc., App. Nos. P-73707 & P-75799 (September 1993).

A carrier need not elect, at the time of transportation, under which of alternative expressions of authority contained in its permit it conducts operations; the alternative expressions merge and are a single authority. RCW 81.80.100; 81.80.270; WAC 480-12-050(5). Order M. V. No. 144088, In re The Cater Transfer and Storage Co., d/b/a Cater Moving Systems/United Couriers, Inc., App. No. P-74167 (October 1991), recon. denied, Order M. V. No. 144282 (December 1991).

A carrier need not elect, at the time of transportation, under which of alternative expressions of authority contained in its permit it conducts the operations. RCW 81.80.100; 81.80.270; WAC 480-12-050(5). Order M. V. No. 142724, In re Star Moving & Storage, Inc./United Couriers, Inc., App. No. P-73707 (February 1991); recon. denied, Order M. V. No. 143256 (May 1991); vacated and remanded on other grounds, Order M. V. No. 143870 (September 1991).

A permit constitutes a single authority, irrespective of the number of times or ways in which particular elements are expressed in the permit language. The separate expressions merge, and cannot be independently transferred. RCW 81.80.100; 81.80.270; WAC 480-12-050. Order M. V. No. 142724, In re Star Moving & Storage, Inc./United Couriers, Inc., App. No. P-73707 (February 1991); recon. denied, Order M. V. No. 143256 (May 1991); vacated and remanded on other grounds, Order M. V. No. 143870 (September 1991).

**RCW 81.80.100 (cont.)**

## **Chapter 81.80 RCW**

The Commission will reject proposed authority that is not susceptible of enforcement and has the potential to encourage unsafe driving practices and/or falsification of records. RCW 81.80.070 (entry common carriers: specialized equipment or service); 81.80.100. Order M. V. No. 142671, In re Sandra Fields & Dennis Scott, d/b/a D & S Couriers, App. No. P-72937 (April 1991).

A proposed amendment to an application for authority is unacceptable when the amendment would produce a vague commodity description or a timing requirement that is not susceptible of enforcement. RCW 81.80.080; RCW 81.80.100; WAC 480-12-045. Order M. V. No. 141737, In re Bullet, Inc., Hearing No. E-19967 (December 1990).

A four-hour delivery requirement is unacceptable permit language because it is not susceptible of enforcement. RCW 81.80.100. Order M. V. No. 141737, In re Bullet, Inc., Hearing No. E-19967 (December 1990).

The Commission may grant a petition for rehearing of an application for authority in order to resolve internally inconsistent permit language and correct apparent errors. RCW 81.04.200; RCW 81.80.100; WAC 480-09-820(1). Order M. V. No. 141669, In re L. L. Buchanan & Co., Inc., App. Nos. P-3065 and E-801 (July 1990).

A carrier whose authority is limited to "shipping units of less than 200 pounds" is not authorized to haul shrink-wrapped pallets weighing 1,000-1,400 pounds, even though the pallets may be composed of individual units weighing less than 200 pounds each. RCW 81.80.100. Order M. V. No. 141005, In re Nello Pistoresi & Son, Inc., App. No. E-19812 (March 1990).

Slurry and juice are two separate and distinct commodities. Authority to haul one does not include authority to haul the other. RCW 81.80.100. Order M. V. No. 140097, In re T & T Milk Transport, Inc., App. No. E-19755 (September 1989).

Only the Commission may lawfully determine the scope of transportation authority. A proposed permit amendment that would allow a city or county to determine the materials authorized for transportation under a motor carrier permit would be an impermissible delegation of Commission authority. RCW 81.01.040(1),(2); RCW 81.80.100. Order M. V. No. 133753, In re Sunshine Disposal, Inc., d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986).

When the Commission finds that an amendment to the application is unclear, and when no adverse effect will accrue to any party, the Commission may alter the language of the amendment to better comport with the intentions of the parties. RCW 81.80.100; WAC 480-08-050(6)(7). Order M. V. No. 133781, In re Donald R. Blankenship Transport, App. No. P-69189 (April 1986).

When a permit holder seeks to transfer one of two duplicating authorities, the Commission will require that the duplicated authority remaining in the transferor's permit be deleted. RCW 81.80.100; WAC 480-12-050(5). Order M. V. No. 129056, In re State Transfer Co., Inc./Interstate Heavy Hauling, Inc., App. No. P-67014 (March 1984).

### **RCW 81.80.100 (cont.)**

## Chapter 81.80 RCW

A permit holder who possesses local cartage authority in Seattle and Bellevue, and Seattle Commercial Zone authority, has duplicative rights that will be construed as a single authority. When the permit holder seeks to transfer one of the two duplicating rights, the Commission may require that the duplicated authority remaining in the transferor's permit be deleted. RCW 81.80.100; WAC 480-12-050(5). Order M. V. No. 129056, In re State Transfer Co., Inc./Interstate Heavy Hauling, Inc., App. No. P-67014 (March 1984).

The authority to pick up and deliver shipments in Seattle that are destined to or from points north of the city does not duplicate the authority to pick up and deliver shipments in Seattle that are destined to or from points south of the city. RCW 81.80.100; WAC 480-12-050(5). Order M. V. No. 129057, In re State Transfer Co., Inc./Edmonds-Alderwood Auto Freight Company, App. No. P-67015 (March 1984).

It is permissible to divide radial authority at a common radial point, so long as there is no duplication of authority. RCW 81.80.100; WAC 480-12-050(5). Order M. V. No. 129058, In re State Transfer Co., Inc./Peninsula Truck Lines, Inc., App. No. P-67016 (March 1984).

Permit authority is not required to have a specific point of origin and a specific destination. When growers may choose various processing plants in different years, the Commission may restrict a grant of authority to reflect a specific point of origin, and a destination within a general territory. RCW 81.80.100. Order M. V. No. 127999, In re Leroy Dodrill, App. No. E-18743 (August 1983).

When different commodity descriptions in different portions of a permit allow hauling the same commodity, the authorities are duplicative. Duplicative authorities will be construed as a single authority for purposes of transfer. When a permit holder transfers a portion of its permit, the duplicating portions in the retained permit authority will be deleted. RCW 81.80.100; WAC 480-12-050(5). Order M. V. No. 127857, In re Bi-County Trucking, Inc./Common Carriers Inc., App. No. P-66173 (July 1983).

A permit holder that seeks to transfer a portion of its authority will not be allowed to retain authority to perform the service transferred. RCW 81.80.100; WAC 480-12-050(5). Order M. V. No. 127857, In re Bi-County Trucking, Inc./Common Carriers, Inc., App. No. P-66173 (July 1983).

A request for authority beyond the docketed commodities cannot be granted without redocketing. RCW 81.80.100; WAC 480-12-045(1)(2). Order M. V. No. 127558. In re Jon S. Pansie d/b/a Tri-Pan Services, App. No. P-65704 (May 1983).

Authority limited to "transportation of dry commodities in bulk in specialized equipment", would be eliminated entirely by an amendment excluding "specialized equipment" upon transfer of the permit. RCW 81.80.100; RCW 81.80.270. Order M. V. No. 126857, In re Michael, Patrick, and William Devries/Jim's Transfer, Inc., App. No. P-66231 (January 1983).

When applicant requests that water be specifically listed in a permit granting the authority to transport well drilling fluid, but industry practice and the proposed order clearly contemplate that "fluid" includes water, the Commission will deny the request. RCW 81.80.100. Order M. V. No. 126379, In re Jim's Water Service, Inc., App. No. P-66065 (October 1982).

## **Chapter 81.80 RCW**

### **RCW 81.80.110 Limitation on renewal of application.**

The statute barring the refiling of an application within six months after the Commission denied it applies to applications of the same type and not to applications for different authority; permanent authority and temporary authority are different types of authority. RCW 81.80.110; 81.80.170; WAC 480-12-033. Order M. V. No. 147519, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-77668 (February 1994).

RCW 81.80.110 establishes an absolute barrier to re-application in less than six months when an application has been denied after hearing. It provides no exceptions, and there is no provision for Commission waiver. RCW 81.80.110. Order M. V. No. 145840, In re A To Z Services, Inc., d/b/a A To Z Zippy Delivery Services, App. No. P-76324 (December 1992).

If the Commission, after hearing, has denied an application within the past six months, it will reject a new application, filed under a different carrier name by and on behalf of the same principals, that overlaps the territory and commodities sought in the denied application. RCW 81.80.110. Order M. V. No. 145732, In re A to Z Services, Inc., d/b/a A to Z Zippy Delivery, App. No. P-76324 (October 1992).

The law prohibiting the refiling of an application applies to applications of the same type, and not to applications for different services (i.e., temporary/permanent). RCW 81.80.110; 81.80.170; WAC 480-12-033; 480-12-045. Order M. V. No. 145703, In re Harlan Skavlem, d/b/a E.R.S. Trucking, App. No. P-76155 (October 1992).

An application for authority sought in an earlier, still-pending application will be rejected. The second application is a useless action, because it is unnecessary if the prior application is granted, and if the prior application is denied, refiling is not legally permitted for six months following denial. RCW 81.80.110; WAC 480-12-045. Order M. V. No. 143920, In re Expedited Express, Inc., App. No. P-75150 (September 1991).

An application for temporary authority is not a "renewal" of an application for continuing authority that was denied. RCW 81.80.110. Order M. V. No. 134470, In re Fin-A-Key Express, Inc., App. No. P-70451 (August 1986).

### **RCW 81.80.120 Classification of carriers.**

#### **Cross Reference**

< Classification of brokers, forwarders, and motor carriers of property:  
See WAC 480-12-033.

A tariff description is not necessarily the same as a description of the authority required to transport a commodity lawfully. Tariff classifications are generally irrelevant to the determination of what authority is

## Chapter 81.80 RCW

required for transportation. RCW 81.80.120; WAC 480-12-990. Order M. V. No. 133160, In re Paul F. and Nancy S. Kimball/Allison-Mitchell Transfer, App. No. P-69103 (February 1986).

The term "medical supplies" includes items "connected with and unique to the practice of medicine" but does not necessarily include any product merely because it is delivered to a hospital. RCW 81.80.120; WAC 480-12-990(17). Order M. V. No. 127558, In re Jon S. Pansie d/b/a Tri-Pan Services, Inc., App. No. P-65704 (May 1983).

For some purposes the Commission's definition of "Hazardous Materials" may parallel that of the Code of Federal Regulations. Used petroleum products are recognized as hazardous materials in the CFR and it is proper to transport them under hazardous materials authority. Evidence of need for transportation of used oil products will support, in part, an application for hazardous materials authority. RCW 81.80.120; WAC 480-12-990(17). Order M. V. No. 126442, In re United Drain Oil Service, Inc., App. No. P-65787 (October 1982).

### **RCW 81.80.130 Regulatory power of commission over common carriers.**

The Commission has no jurisdiction to review an action of the Interstate Commerce Commission, either directly or collaterally. RCW 81.80.130; 81.80.270. Order M. V. No. 147040, In re Star Moving & Storage, Inc./United Couriers, Inc., App. Nos. P-73707 & P-75799 (September 1993).

When the ICC preemptively transfers a portion of an intrastate permit, the WUTC retains authority to reissue the transferor's permit and to delete all authority that has been transferred. RCW 81.80.130; 81.80.270; WAC 480-12-050. Order M. V. No. 147040, In re Star Moving & Storage, Inc./United Couriers, Inc., App. Nos. P-73707 & P-75799 (September 1993).

When the Interstate Commerce Commission has asserted jurisdiction and has ordered that certain authority be transferred, the Commission is required by federal law to authorize the transfer. RCW 81.80.130; 81.80.370; 81.80.270; WAC 480-12-050. Order M. V. No. 145580, In re Star Moving & Storage, Inc./United Couriers, Inc., App. No. P-73707 (September 1992).

Transportation of recyclable commodities from points in Washington to another point in Washington, where they are processed and mixed with other processed substances to make a new commodity called a kiln fuel, is intrastate transportation. This is true although the shipper intends at the time of the initial shipment that the processed commodity will be shipped out of the state. RCW 81.80.010(4); 81.80.130. Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991).

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### **RCW 81.80.130 (cont.)**

Speculative allegations that a proposed service might violate federal law (the Private Express Statutes of the U. S. Postal Service), which are not established by the record, will not require denial of an application. RCW 81.80.070 (entry common carriers: burden of proof); 81.80.130. Order M. V. No. 143056, In re D & D ICS Group, Inc., d/b/a Insurance Courier Services, App. No. P-73119 (April 1991); recon. denied, Order M. V. No. 143513 (July 1991).

The Commission may set rates that produce operating ratios that will move over time as the carrier's costs and revenues change, so long as the rates are neither so high as to be unreasonable, nor so low as to be confiscatory. A "zone of reasonableness" exists between the maximum and the minimum rates allowable, within which the Commission may exercise discretion. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130. Cause TV-1831, Increased Rates in WUTC Tariff No. 7-B (Bulk Petroleum) (February 1986).

The ultimate issue in a tariff filing is whether the proposed rates are fair, just, reasonable, and sufficient. When petroleum carriers show, and staff investigation confirms, that a five percent increase in rates will provide an operating ratio within the approved range, the Commission will approve the requested increase. RCW 81.04.250; RCW 81.28.230; RCW 81.80.130. Cause TV-1895, In re WUTC Tariff No. 7-B (Bulk Petroleum) (February 1986).

The Commission will not grant authority for a permit with a commodity description that is too vague to identify the authority sought. RCW 81.80.080; RCW 81.80.130. Order M. V. No. 133329, In re James J. Balderson Trucking, Inc., App. No. P-68578 (January 1986).

### **RCW 81.80.170 Temporary permits.**

#### **Cross Reference**

< Temporary Permits: See WAC 480-12-033.

The Commission will not rescind a grant of temporary authority that was properly made and that is consistent with the public interest. RCW 81.80.170; WAC 480-12-033. Order M. V. No. 147519, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-77668 (February 1994).

The statute barring the refiling of an application within six months after the Commission denied it applies to applications of the same type and not to applications for different authority; permanent authority and temporary authority are different types of authority. RCW 81.80.110; 81.80.170; WAC 480-12-033. Order M. V. No. 147519, In re Hays Home Delivery (Washington), Inc., d/b/a Hays Home Delivery, App. No. P-77668 (February 1994).

The Commission may change a permit to remove language that might be misconstrued as granting authority that the applicant did not seek and the Commission did not intend to grant. RCW 81.80.170; WAC 480-12-033(5). Order M. V. No. 147362, In re Rick and Jess Penfold, d/b/a J.R. Penfold, App. No. P-77089 (January 1994).

### **RCW 81.80.170 (cont.)**

The primary reason for a grant of temporary authority is the proximity of the need for service, rather than

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the duration of the need for service. RCW 81.80.170; WAC 480-12-033. Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).

Temporary authority is an appropriate solution to transportation shortages that occur during peak harvest seasons, but it is not necessarily the exclusive solution. RCW 81.80.070 (entry common carriers: need for service); RCW 81.80.170; WAC 480-12-033. Order M. V. No. 146902, In re Don B. Hightower, d/b/a The Navajo Trucking, App. No. E-76397 (September 1993).

RCW 81.80.170, rather than RCW 81.80.070, governs a grant or denial of temporary authority. RCW 81.80.070 (entry common carriers: need); RCW 81.80.170; WAC 480-12-033. Order M. V. No. 146831, In re Rombough, Scot & Tamura, Joseph, d/b/a R/T Delivery, App. No. P-76921 (August 1993).

The law prohibiting the refiling of an application applies to applications of the same type, and not to applications for different services (i.e., temporary/permanent). RCW 81.80.110; 81.80.170; WAC 480-12-033; 480-12-045. Order M. V. No. 145703, In re Harlan Skavlem, d/b/a E.R.S. Trucking, App. No. P-76155 (October 1992).

Termination of temporary authority, at the conclusion of the adjudication of a related application for continuing authority, is not a deprivation of a right. RCW 81.80.020; RCW 81.80.170; WAC 480-12-033. Order M. V. No. 141271, In re Becker Trucking, Inc. d/b/a Becker Trucking; Becker Express, App. No. 19787 (April 1990).

The existence of temporary authority cannot be considered in determining whether the statutory standard for a grant of continuing authority has been met. RCW 81.80.070 (entry common carriers: need for service); RCW 81.80.170; WAC 480-12-033. Order M. V. No. 141271, In re Becker Trucking, Inc. d/b/a Becker Trucking; Becker Express, App. No. P-19787 (April 1990).

Unneeded authorities have a detrimental effect on the regulated environment and temporary authorities should be cancelled as soon as possible after the application for permanent authority is denied. RCW 81.80.020; RCW 81.80.170. Order M. V. No. 140505, In re Jobbers Freight Service, Inc., App. No. P-70386 (December 1989).

Temporary authorities are designed, in part, to meet urgent needs on short notice. The urgent nature of the needs plus the short-lived nature of the authority require expedited processing. Reviewing conflicting factual claims of parties in a full hearing could take longer than the temporary authority would be effective, and would paralyze the abilities of transportation companies to meet urgent needs. RCW 81.80.170; WAC 480-12-033(1). Order M. V. No. 139007, In re Community Enterprises of Issaquah, App. No. P-71976 (March 1989).

### **RCW 81.80.170 (cont.)**

Temporary common carrier authority is designed to provide an interim solution to pressing shipper needs and to preserve the positions of the parties pending a full resolution of the facts on the merits. The Commission may defer factual controversies to a parallel application for continuing authority. RCW



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81.80.170; WAC 480-12-033. Order M. V. No. 134455, In re Raymond O. Daniel, d/b/a P D Xpress, App. No. P-70239 (August 1986).

An application for temporary authority is not a "renewal" of an application for continuing authority that was denied; it does not violate the prohibition against an applicant's reapplication within six months of the entry of a final order denying continuing authority. RCW 81.80.110; RCW 81.80.170; WAC 480-12-033. Order M. V. No. 134470, In re Fin-A-Key Express, Inc., App. No. P-70451 (August 1986).

An application for temporary authority is different from an application for continuing authority. A grant of temporary authority has no bearing on the appropriateness of a grant of continuing authority, and a grant of continuing authority has no bearing on the appropriateness of a grant of temporary authority. RCW 81.80.170; WAC 480-12-033. Order M. V. No. 134470, In re Fin-A-Key Express, Inc., App. No. P-70451 (August 1986).

Temporary authority is granted upon a prima facie statement of need and a limited staff investigation. Temporary authority is designed to meet pressing needs. Protestant's challenge to the veracity of the applicant's representations raises issues better left for a full hearing. RCW 81.80.170; WAC 480-12-033. Order M. V. No. 130021, In re OMI, Inc., App. No. P-68288 (July 1984).

A carrier operating under temporary authority who has had three hearings with opportunities to present arguments in briefs and petitions, but whose application for continuing authority has been denied, is not losing his operating right without due process of law. Temporary authority expires upon final resolution of an application for authority proceeding. RCW 81.80.170; WAC 480-12-033. Order M. V. No. 128067, In re Jon S. Pansie d/b/a Tri-Pan Services, Inc., App. No. P-67552 (December 1983).

A grant of temporary authority is founded on affidavits submitted by the applicant, subject to staff review, and upon considerations of the public interest. Assertions that the facts alleged to support the temporary authority are insufficient to provide a basis for a grant of authority present issues best left for a full hearing on continuing authority. RCW 81.80.170; WAC 480-12-033(1)(b). Order M. V. No. 128761, In re United Truck Lines, Inc., App. No. P-67323 (December 1983).

### **RCW 81.80.260 Operation in more than one class.**

When a Commission order fails to make a numbered finding that an applicant's operation of vehicles in two classes of operations is in the public interest, though the issue was discussed in the Commission's order, the Commission will grant reconsideration and add the omitted finding. RCW 34.04.120; RCW 81.80.260; WAC 480-08-250. Order M. V. No. 136846, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. E-19233 (November 1987).

**RCW 81.80.270**      **Transfer, assignment of permits--Acquisition of carrier holding permit, commission approval--Duties on cessation of operation.**

**Cross Reference**

< Transfer of Permit Rights: See WAC 480-12-050.

A common carrier permit, once issued and while being exercised, is a property right, and may not be taken from a permit holder without the fairly clear indication that there was an intention to abandon the permit or a part of it, or that some other principle is paramount to the property right. RCW 81.80.270; WAC 480-12-050.

Order M. V. No. 143760, In re Mercer Trucking Co., Inc./ Zeph H. Robinson, d/b/a Robinson Excavating & Trucking, App. No. P-74033 (August 1991).

Order M. V. No. 132877, In re Paffile Truck Lines Inc./Service Truck Lines, Inc.; Paffile Truck Lines, Inc./Oak Harbor Freight Lines, Inc., App. Nos. P-68392; P-68434 (December 1985).

Lee and Eastes v. Public Service Commission, 52 Wn.2d 701, 328 P.2d 700 (1958).

A carrier must have acquired continuing or permanent authority and have exercised that authority by holding itself out to conduct operations before its permit becomes a transferable property right. RCW 81.80.270; WAC 480-12-050(4)(a).

Order M. V. No. 143329, In re Rambler Cincon, Inc./Rambler Trucking, Inc., App. No. P-73907 (May 1991); recon. denied., Order M. V. No. 143692 (July 1991).

Order M. V. No. 135296, In re Evergreen Western Express Service, Inc. d/b/a W.E.S./Fleetfoot Max, Inc. d/b/a Fleetfoot Messenger Service, App. No. P-70205 (January 1987).

The Commission will deny a common carrier's application to transfer part of its rights in a permit when the partition would result in the separation of commodities from a class of substantially related commodities or from a commodity classification in WAC 480-12-990 (Appendix "A" to Chapter 480-12 WAC). RCW 81.80.270; WAC 480-12-050; 480-12-990. Order M. V. No. 147766, In re Arrow Transportation/Harris Transportation Company, App. No. P-76931; In re Arrow Transportation/ McCall Oil and Chemical Corporation, d/b/a Cascade Petroleum Transportation, App. No. P-76933 (April 1994).

When the Interstate Commerce Commission has asserted jurisdiction and has ordered that certain authority be transferred, the Commission is required by federal law to authorize the transfer. RCW 81.80.130; 81.80.370; 81.80.270; WAC 480-12-050. Order M. V. No. 145580, In re Star Moving & Storage, Inc./United Couriers, Inc., App. No. P-73707 (September 1992).

The proper tests for approval of a transfer application are the fitness of the transferee and whether the transferor was ready, willing and able during the test period to conduct operations under the permit and so held itself out to the public. The issue of need for additional carriage is not directly relevant to a transfer application. RCW 81.80.270; WAC 480-12-050. Order M. V. No. 134831, In re Gary Lavelle, d/b/a Lavelle Trucking/Dave Bekkevar, d/b/a Dave Bekkevar Logging & Trucking, App. No. P-70140 (October 1986).

**RCW 81.80.270 (cont.)**

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A transferee who purports to acquire a permit without Commission approval operates unlawfully. It is unlawful to operate without a permit and it is unlawful to transfer a permit without Commission approval. RCW 81.80.270; WAC 480-12-050. Order M. V. No. 126465, In re John Huffman/Nick's Hauling Service, Inc., App. No. P-65687 (October 1982).

### **RCW 81.80.280      Cancellation of permits.**

The Commission may cancel the permit of a carrier who has ceased operations and abandoned its permit. RCW 81.80.280. Order M. V. No. 145830, WUTC v. Toledo Trucking, Inc., Hearing No. H-5005; In re Toledo Trucking, Inc./Elmer Cook Trucking, Inc., App. No. P-75157 (December 1992).

The Commission may cancel a permit when the permittee has repeatedly violated Chapter 81.80 RCW. RCW 81.80.280. Order M. V. No. 145830, WUTC v. Toledo Trucking, Inc., Hearing No. H-5005; In re Toledo Trucking, Inc./Elmer Cook Trucking, Inc., App. No. P-75157 (December 1992).

### **RCW 81.80.290      Rules and regulations.**

Rules are unnecessary for the implementation of statutes that do not require the exercise of Commission discretion, when existing Commission procedures provide adequate protections to potentially affected parties. RCW 34.04.010(2); RCW 81.04.160; RCW 81.80.290. Order M. V. No. 138133, In re Metro Hauling, Inc., App. No. E-19614 (August 1988). Related filings: Order M. V. No. 138134, In re Great Northern Truck Express, Inc., App. No. E-19633 (August 1988); Order M. V. No. 138132, In re Erdahl Brothers Trucking, Inc., App. No. E-19653 (August 1988). Order M. V. No. 138357, In re Action Express, Inc., App. No. E-19642 (November 1988).

### **RCW 81.80.312      Interchange of trailers, semitrailers, or power units--Interchange agreement, approval, restrictions--Procedure when no agreement.**

The Commission has a particular interest in areas of interlease arrangements when interchanges between authorities are contemplated. The Commission has a right to a detailed showing of the proposed operating patterns between the individual carriers because the particular problems of enforcement make knowledge essential to compliance with Commission rules. When the applicant gives no credible evidence on the interlease arrangements, the application is properly denied. RCW 81.80.312; WAC 480-12-210; WAC 480-12-215. Order M. V. No. 126084, In re Tacoma Hauling Co., Inc., App. No. E-18498 (September 1982). Order M. V. No. 140840, In re Mayne Nickless Courier Systems, Inc. d/b/a Bucky's Courier Systems, App. No. P-72291 (January 1990). Order M. V. No. 142136, Quad Enterprises, Inc./Group VI, Inc., Hearing No. P-73257 (December 1990).

### **RCW 81.80.370      Application to interstate commerce.**

When the Interstate Commerce Commission has asserted jurisdiction and has ordered that certain authority be transferred, the Commission is required by federal law to authorize the transfer. RCW 81.80.130;

81.80.370; 81.80.270; WAC 480-12-050. Order M. V. No. 145580, In re Star Moving & Storage, Inc./United Couriers, Inc., App. No. P-73707 (September 1992).

When the Interstate Commerce Commission has asserted jurisdiction and has ordered that intrastate authority be operated by an applicant while an application for transfer is pending before the ICC, the Commission is required by federal law to issue temporary intrastate authority. RCW 81.80.370. Order M. V. No. 145338, In re United Couriers, Inc., App. No. P-75798 (July 1992).

The Commission retains jurisdiction to regulate carriers under contract with an agency of the federal government when the agency declines to exercise the federal constitutional privilege to preempt state transportation regulation. RCW 81.80.370. Order M. V. No. 136237, In re United Couriers Northwest, Inc., App. No. P-70574 (July 1987).

**RCW 81.80.380 Cooperation with federal government.**

Future need based on traffic travelling between states, with travel in Washington comprising merely a leg in interstate traffic, does not support an application for intrastate authority. RCW 81.80.380. Order M. V. No. 125960, In re Peninsula Yacht Moving, Inc., App. No. E-18581 (August 1982).

**RCW 81.80.400 Commercial zones and terminal areas--Common carriers doing business within zones prior to designation of zone--Persons seeking to serve as common carrier after designation.**

Eligibility for commercial zone authority is determined by the existence of qualifying permit authority, not by the identity of the applicant. An applicant for commercial zone authority who received permit authority by transfer may subsequently show that the permit acquired qualified for commercial zone authority. RCW 81.80.400; WAC 480-12-031. Order M. V. No. 132604, In re Evergreen Western Express Service, Inc. d/b/a Western Express Service, Inc., App. No. P-Z-69612 (October 1985).

**RCW 81.80.410 Commercial zones and terminal areas--Common carriers having general freight authority prior to designation.**

A carrier eligible for authority under RCW 81.80.410 may not lawfully conduct operations thereunder unless it first makes application and by order is granted an extension of its permit authority. The only issue in such application is whether the applicant possessed qualifying authority on the qualifying date. Order M. V. No. 136728, In re Metro Hauling, Inc., App. No. E-19363 (October 1987).

The purpose of RCW 81.80.410 is to facilitate transportation of goods between commercially interdependent areas, including cities, and other towns or cities. Possession of authority as of August 27, 1982, for service between a named city and points in the state, is qualifying authority under the statute. Order M. V. No. 136728, In re Metro Hauling, Inc., App. No. E-19363 (October 1987).

**RCW 81.80.410 (cont.)**

A grant of terminal area authority under RCW 81.80.410 extends only a carrier's territorial authority. The Commission may only add the terminal areas to expand the vicinity pickup and delivery service; it may not alter underlying intercity authority. RCW 81.80.410; WAC 480-12-082. Order M. V. No. 138133, In re

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Metro Hauling, Inc., App. No. E-19614 (August 1988). Related filings: Order M. V. No. 138134, In re Great Northern Truck Express, Inc., App. No. E-19633 (August 1988). Order M. V. No. 138132, In re Erdahl Brothers Trucking, Inc., App. No. E-19653 (August 1988).

In granting an extension of intercity general freight common carrier authority to provide pickup and delivery services in terminal areas, the Commission may only expand the vicinity of service; it may not alter underlying intercity authority. RCW 81.80.410; WAC 480-12-082. Order M. V. No. 138096, In re Action Express, Inc., App. No. E-19642 (August 1988).

Qualification for a grant of terminal area authority is not dependent on having a named city as a point of service as is the case with Commercial Zones. WAC 480-12-082(2) specifically includes "...carriers of general freight having authority as part of their intercity service to perform pickup or delivery at any place in such zone or area." RCW 81.80.410; WAC 480-12-082(2). Order M. V. No. 138133, In re Metro Hauling, Inc., App. No. E-19614 (August 1988).

Any grant of authority pursuant to RCW 81.80.410 and WAC 480-12-082 must be limited to the same types of service and commodity as were authorized and held by the applicant or its predecessor in interest on July 28, 1982. Order M. V. No. 140484, In re Metro Hauling, Inc., App. No. E-19614 (November 1989).

An extension of intercity common carrier authority to provide terminal area pick up and delivery service will be granted to applicants who held pertinent general freight authority on July 28, 1982. RCW 81.80.410; WAC 480-12-082. Order M. V. No. 140484, In re Metro Hauling, Inc., App. No. E-19614 (November 1989).

In an application for terminal area authority, the extension of authority is territorial only and the limitations and restrictions on the general freight authority contained in the original permit must be carried over and included in the terminal area authority. RCW 81.80.410; WAC 480-12-082. Order M. V. No. 140681, In re Action Express, Inc., App. No. E-19642 (December 1989); Order M. V. No. 140688, In re Joy Motor Freight, Inc., App. No. E-19688 (December 1989); Order M. V. No. 140698, In re Erdahl Brothers Trucking, Inc., App. No. E-19653 (December 1989); Order M. V. No. 140700, In re Okanogan-Seattle Transport Co., Inc., App. No. E-19689 (December 1989).

Each of the limitations and restrictions applying to an applicant's qualifying underlying authority applies to an extension granted pursuant to RCW 81.80.410. Restrictions on that underlying authority cannot be removed in a proceeding to add terminal area pickup and delivery authority, but must be accomplished by full application for an extension of authority. RCW 81.80.410; WAC 480-12-082. Order M. V. No. 141103, In re Peninsula Truck Lines, Inc., App. No. E-19633 (March 1990).

## CHAPTER 81.84 RCW

### STEAMBOAT COMPANIES [COMMERCIAL FERRIES]

#### **RCW 81.84.010 Certificate of convenience and necessity required--Progress reports**

Locating one terminus of a proposed non-Indian commercial ferry operation incidentally within an Indian reservation does not exempt the proposal from state regulation. RCW 81.84.010. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (March 1997).

Written shipper statements may be received in support of an unprotested application for authority to provide ferry service in territory not presently served. RCW 81.84.010. Order S.B.C. No. 519, In re Mosquito Fleet Enterprises, Inc., App. No. B-78420 (March 1996).

The Commission does not regulate waterborne excursion and sightseeing traffic. RCW 81.84.010; WAC 480-50-020. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

When a literal interpretation of a statute leads to a strained or absurd result, a statute should be construed to effect its purpose. RCW 80.01.040; 81.84.010. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

"Regular route," in the context of RCW 81.84.010, means a route along which a commercial ferry stops at one or more places to pick up or leave passengers or freight. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

"Terminus" means either end point of a voyage, where passengers or freight terminate passage. RCW 81.84.010; WAC 480-50-060. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

A service that is a single sightseeing excursion passage from the point of origin to the point of origin, that happens to stop temporarily at a point along the way, is not a round-trip service. A round-trip is a combination of two one-way passages. RCW 81.84.010. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

The classification of a voyage is determined by the characteristics and purpose of the voyage, not the subjective intention of any single passenger. RCW 81.84.010; WAC 480-50-020. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

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### **RCW 81.84.010 (cont.)**

The test for regulation of waterborne passenger service is whether a passenger completes a journey at a point other than the point of origin, not merely whether a passenger leaves the boat even momentarily. Service that does not allow one-way travel does not require Commission approval. RCW 81.84.010; WAC 480-50-020. In re San Juan Express, Inc. [v. Yachtship Cruiselines, Inc. and Glacier Bay Lodge, Inc.], Docket No. TS-940956, Fifth Supplemental Order (December 1994).

Point-to-point service between land points would not authorize launch service. RCW 81.84.010. Order S. B. C. No. 499, In re Gray Line Cruises & Tours, Inc., d/b/a Bellingham Bay Tours, App. No. B-77004 (December 1993).

Once a steamboat certificate is granted, a successful applicant has a duty to begin service within a reasonable time. RCW 81.84.010; 81.84.030; WAC 480-50-130. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

The Commission will grant a steamboat application under chapter 81.84 RCW when the applicant is qualified, the service is required by the public convenience and necessity and the proposed service is not in violation of RCW 47.60.120. RCW 81.84.010; 47.60.120. Order S. B. C. No. 483, In re Mosquito Fleet Enterprises, Inc., d/b/a Mosquito Fleet, App. No. B-317 (January 1991).

The Commission may grant authority to two applicants who are fit, willing, and able to provide service when the level of need is sufficiently great and the demands on the applicants are such that service "to the satisfaction of the Commission" cannot be rendered unless both carriers are authorized to do so. RCW 81.84.010; WAC 480-50-020(2). Order S. B. C. No. 474, In re Belairco, Inc., App. No. B-313; Order S. B. C. No. 473, In re Jack L. Harmon & Jack W. Rood d/b/a Arrow Launch Service, App. No. B-316 (September 1990).

Unless a map, chart, or other illustrative document is incorporated by reference in an order granting authority and a certificate of authority, the document does not itself form the basis for any authority. RCW 81.84.010. Order S. B. C. No. 467, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308; Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

An anchorage zone need not be specifically designated by the federal government in order to be a fixed terminus for purposes of launch authority. RCW 81.84.010. Order S. B. C. No. 467, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308; Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

Brief adjudicative proceedings may be used in situations authorized by rule. In light of a lack of statutory authority, temporary authority may not be granted to a steamboat company. RCW 81.84.010; WAC 480-09-500; WAC 480-09-510. Order S. B. C. No. 461, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308 (December 1989); Order S. B. C. No. 463, In re Belairco, Inc., d/b/a A.I.T. Waterways, App. No. B-313 (December 1989).

**RCW 81.84.010 (cont.)**

A fixed schedule is not a necessary characteristic of launch service. RCW 81.84.010 requires permit authority in order to provide any transportation by vessel for public use for hire. Order S. B. C. No. 434, In re Donald D. Frizzell, App. No. B-296 (July 1987).

The Commission has no jurisdiction over directly assigned functions of the federal government or over transportation that is not performed for compensation. That the Commission does not regulate such transactions is not a basis for exempting "for hire" activity from regulation. RCW 81.84.010. Order S. B. C. No. 434, In re Donald D. Frizzell, App. No. B-296 (July 1987).

Exceptions questioning the willingness of an applicant with a charter fishing service to provide launch service will be denied when the applicant has credibly committed to provide launch service. RCW 81.84.010. Order S. B. C. No. 434, In re Donald D. Frizzell, App. No. B-296 (July 1987).

When the applicant's equipment is sufficient, an application will not be denied on the grounds that a protestant's equipment is superior. RCW 81.84.010. Order S. B. C. No. 434, In re Donald D. Frizzell, App. No. B-296 (July 1987).

When shippers show an existing carrier's refusal to provide only standby service, the Commission will limit the grant of authority to the stated need. RCW 81.84.010. Order S. B. C. No. 434, In re Donald D. Frizzell, App. No. B-296 (July 1987).

A steamboat carrier whose proposed operation would be under contract with a county acts as the county's agent and operates under the county's authority. A proposal to provide launch service to ships at port, performed under contract with a county, requires no certificate from the WUTC. RCW 81.84.010. Order S. B. C. No. 404, In re Lavina Longstaff d/b/a Sea Wolf Charters, App. No. B-282 (August 1983).

**RCW 81.84.020      Application--Hearing--Issuance of certificate--Determining factors.**

RCW 47.60.120, the statute which prohibits private ferry crossings within ten miles of a state ferry crossing over Puget Sound unless the WUTC grants a waiver from the restriction, does not grant the Commission power unilaterally to grant a waiver to permit private ferry service that would compete directly with Washington State Ferries routes or replace those routes. RCW 47.60.120; RCW 81.84.020. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (February 1997).



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### **RCW 81.84.020 cont.**

A proposal for private ferry service is not eligible for waiver under RCW 47.60.120 if it would impose substantial detriment on the Washington State Ferries through disruption of the statutory, multi-agency planning processes. RCW 47.60.120; RCW 81.84.020. Order S. B. C. No. 533, In re Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer, Hearing No. B-78487; In re San Juan Express, Inc., Hearing No. B-78511 (February 1997).

The Commission may, after hearing, grant a waiver of the ten-mile restriction in RCW 47.60.120(1) in an application for authority to provide ferry service when it determines that the waiver is not detrimental to the public interest after consideration of factors including the impact on the Washington state ferry system and the impact on transportation congestion mitigation and air quality improvement. RCW 47.60.120; RCW 81.84.020. Order S.B.C. No. 519, In re Mosquito Fleet Enterprises, Inc., App. No. B-78420 (March 1996).

If no existing certificate holder serves the requested territory within the meaning of RCW 81.84.020, the Commission may grant an application for steamboat (commercial ferry) authority upon a showing that the proposed service is in the public interest and is required by the present or future public convenience and necessity. Order S. B. C. No. 510, In re Mosquito Fleet Enterprises, Inc., App. No. B-78232 (May 1995).

Two competing applications for authority to conduct passenger and freight launch service may both be granted if the Commission finds that the nature of the service, the level of need, and the applicants' ability to fully meet the shippers' needs, are consistent with a grant of authority to more than one carrier. RCW 81.84.020. Order S. B. C. No. 467, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308; Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

If no carrier has existing authority, the Commission may grant an application for authority upon a showing of need for the service. If a certificate holder already exists, the Commission may grant a certificate of authority to serve the same territory only if the authorized carrier has failed or refused to furnish reasonable and adequate service. RCW 81.84.020. Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

An applicant's financial picture must be evaluated as a whole, without placing undue emphasis on one line of a balance sheet. If an applicant has conducted operations under its existing certificate, without having failed to meet financial obligations as they fall due, the Commission may reason that the applicant is financially fit. RCW 81.84.020. Order S. B. C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

The Commission may issue a certificate to operate as a steamboat company only after notice and hearing. No ex parte grant of authority is authorized by statute. RCW 81.84.020. Order S. B. C. No. 461, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308 (December 1989); Order S. B. C. No. 463, In re Belairco, Inc., d/b/a A.I.T. Waterways, App. No. B-313 (December 1989).

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### **RCW 81.84.020 (cont.)**

The Commission may grant steamboat authority only when it finds that an existing certificate holder has not provided satisfactory service. RCW 81.84.020. Order S. B. C. No. 434, In re Donald D. Frizzell, App. No. B-296 (July 1987).

The means of service used to apprise potential parties in a steamboat application of impending Commission action is reasonably calculated to put parties on notice of that action and does not violate due process. Proof that actual delivery has been effected is not necessary for Commission action to be effective. RCW 81.84.020; WAC 480-08-060(4). Order S. B. C. No. 427, In re Delphia Virginia Browne, App. No. B-293. (December 1986).

Reopening upon a claim that no notice of hearing had been received is not appropriate when the file shows proof of service demonstrating prima facie that notice was sent to all contemporary certificate holders. A petitioner's mere contention that it was unable to discover that it had received notice is not sufficient to overcome a presumption that service was complete. RCW 81.04.210; RCW 81.84.020. Order S. B. C. No. 427, In re Delphia Virginia Browne, App. No. B-293 (December 1986).

### **RCW 81.84.030 Certificate--Transfer**

Steamboat authority that is not exercised does not ripen into a property right. RCW 81.84.030; WAC 480-50-120. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

The Commission review of a complaint alleging that a steamboat company has failed to observe the conditions or provisions of its certificate will be based on the factual situation extant at the time the complaint is filed. RCW 81.84.030; WAC 480-50-130. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

Once a steamboat certificate is granted, a successful applicant has a duty to begin service within a reasonable time. RCW 81.84.010; 81.84.030; WAC 480-50-130. Order S. B. C. No. 490, Clipper Navigation, Inc. v. Puget Sound Express, Inc., Docket No. TS-900977 (February 1992).

## **CHAPTER 81.90 RCW**

### **LIMOUSINE CHARTER CARRIERS**

Chauffeur-driven vehicles that carry between four and sixteen passengers and are operated as limousines consistent with RCW 81.90.010(5) are limousines. RCW 81.90.010. Order M. V. L. No. 922, WUTC v. White Goose Garage, Inc., Hearing No. H-5016 (August 1994).

## **CHAPTER 81.108 RCW**

### **LOW-LEVEL RADIOACTIVE WASTE SITES**

#### **RCW 81.108.030 Commission--Powers**

In determining whether it is required to implement its regulatory authority under Chapter 81.108 RCW over the disposal of low level radiological wastes, the Commission presumes that a site operator is exempt and then determines whether a "monopoly situation" exists with respect to the site. RCW 81.108.030; 81.108.100. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

RCW 81.108.030 gives the Commission discretion to choose the most appropriate method to determine disposal rates to be charged by site operators so as to assure that they are fair, just, reasonable, and sufficient. RCW 81.108.030. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

#### **RCW 81.108.040 Rates--Initial determination--Fees**

In a proceeding under Chapter 81.108 RCW to determine an initial maximum disposal rate for low level radiological waste, the site operator has a statutory obligation to submit a cost study to support its rate proposal. RCW 81.108.040. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

To adopt a revenue requirement for a low-level waste disposal site operator who is in a monopoly situation that would put it in a better position than it was under competition would be an unfair burden for monopoly customers when the revenue requirement is not required for rates that are fair, just, reasonable and sufficient. RCW 81.108.040. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

Chapter 81.108 contemplates rates for monopoly low-level waste disposal site operators that are fair, just, reasonable, and sufficient rather than rates that merely maintain pre-regulation overall revenue levels. RCW 81.108.040. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

An appropriate rate design under Chapter 81.108 RCW must yield the company's revenue requirements; should be stable; should have rates that are fair in apportioning costs among different ratepayers; and should be practical to administer and understandable to customers. RCW 81.108.040; 81.108.050. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

#### **RCW 81.108.050 Maximum rates--Revisions**

The Commission may accept a settlement agreement in a rate proceeding when it finds that the proposed settlement is consistent with the public interest. RCW 81.108.050; WAC 480-09-465. WUTC v. US Ecology, Inc., Docket No. UR-950619; In re US Ecology, Inc., Docket No. UR-950620; Sixth Supplemental Order (December 1995).

When a company uses an operating ratio methodology to set rates, in which recovery of and return on capital is covered by the margin, rather than by inclusion in the calculation of the margin, any migration of capital needs to operating expenses raises concerns that the company may be gaming the formula, and may be disallowed. RCW 81.108.050. WUTC v. US Ecology, Inc., Docket No. UR-950619; In re US Ecology, Inc., Docket No. UR-950620; Sixth Supplemental Order (December 1995).

The Commission may accept a settlement agreement that resolves some of the issues in a rate proceeding when it finds the proposed settlement to be consistent with the public interest. RCW 81.108.050; WAC 480-09-465. WUTC v. US Ecology, Inc., Docket No. UR-950619; In re US Ecology, Inc., Docket No. UR-950620; Fifth Supplemental Order (October 1995).

An appropriate rate design under Chapter 81.108 RCW must yield the company's revenue requirements; should be stable; should have rates that are fair in apportioning costs among different ratepayers; and should be practical to administer and understandable to customers. RCW 81.108.040; 81.108.050. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

The disposal rate adjustment mechanisms provided in Chapter 81.108 RCW should provide regular updating of rates according to the company's actual experience. RCW 81.108.050, 81.108.070. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

#### **RCW 81.108.070 Extraordinary volume adjustment**

The disposal rate adjustment mechanisms provided in Chapter 81.108 RCW should provide regular updating of rates according to the company's actual experience. RCW 81.108.050, 81.108.070. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

## **Chapter 81.108 RCW**

### **RCW 81.108.100 Exemptions--Monopolies--Hearings--Rates**

In determining whether it is required to take affirmative steps to implement its regulatory authority under Chapter 81.108 RCW over the disposal of low level radiological wastes, the Commission presumes that a site operator is exempt and then determines whether a "monopoly situation" exists with respect to the site. RCW 81.108.030; 81.108.100. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

In applying its enabling legislation, the Commission generally looks to the plain meaning of the statutory language, and applies a statute to effectuate harmony with all of its other provisions. RCW 81.108.100. Seventh Supplemental Order, In re US Ecology, Inc., Docket No. TG-920234 (December 1992).

